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U.S. HOUSE OF REPRESENTATIVES

OVERVIEW OF CURRENT PROVISIONS OF U.S. TRADE LAW

DECEMBER 4, 1984

Prepared for the use of the Committee on Ways and Means by its staff

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LETTER OF TRANSMITTAL

COMMITTEE ON WAYS AND MEANS,
U.S. HOUSE OF REPRESENTATIVES,
Washington, DC, December 4, 1984.

Hon. DAN ROSTENKOWSKI,
Chairman, Committee on Ways and Means,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Four years ago, at your request, the committee staff began a series of projects to develop on a consolidated basis background material for the use of committee members on the broad scope of programs under the jurisdiction of the Committee on Ways and Means. As you know, the first result of that effort is a publication entitled, Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means. This "Green Book" was first issued during the First Session of the 97th Congress and has been revised annually to keep pace with the extensive amount of legislative activity that has occurred during the past four years.

As a result of the increased focus on trade matters by the committee during the 98th Congress and in anticipation of a continued high level of activity in this area, the staff has now prepared for the use of the committee this document entitled, Overview of Current Provisions of U.S. Trade Law, to provide a description of the provisions, operation and background of existing U.S. foreign trade laws and programs.

The statutory authorities selected are the major provisions of federal law which are directly related to the conduct of U.S. international trade. The compilation is not meant to be a comprehensive treatise of every trade-related law or program, nor does it cover provisions to regulate domestic commerce. The laws and programs which are within the jurisdiction of the Committee on Ways and Means are the main focus of this document and are discussed in greater detail. In addition, some of the laws and programs described may be within the jurisdiction of other committees of the House. These provisions are included in order to provide a complete survey of the principal trade authorities.

The descriptions explain the major provisions of each law or program. They do not, however, substitute for the legal text or constitute official legislative history.

The document has been prepared by our trade staff with assistance from the Congressional Research Service and various government agencies and is a first attempt to consolidate and summarize a varied and evolving set of statutory material. As such, any suggestions how to improve the document as a reference tool would, of course, be appreciated. Appropriate suggestions for improvements either in content or in format will be reflected in later versions of this publication.

As increased attention is devoted to the important role of international trade in the world economy, it is hoped that the enclosed compilation of materials will lead to a more informed debate and serve as a resource for better understanding not only of current trade issues but also of the existing statutory remedies in place that are designed to address them.

Sincerely,

JOHN J. SALMON, *Chief Counsel.*

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INTRODUCTION

The role of Congress in formulating international economic policy and regulating international trade is based on a specific Constitutional grant of power. Article I of the U.S. Constitution sets forth the various powers and responsibilities of the legislature. Article I, section 8 lists certain specific express powers of the Congress. Among these express powers are the powers:

> "to lay and collect taxes, duties, imposts and excises . . . [and] to regulate commerce with foreign nations and among the several states."

The Congress therefore is the fundamental authority responsible for Federal Government regulation of international transactions. Within the House of Representatives, jurisdiction over trade legislation lies in the Committee on Ways and Means, based on its jurisdiction over taxes, tariffs, and trade agreements. Throughout the history of U.S. trade law and policy, the role of the Committee on Ways and Means has been at the forefront of its development, ranging from regulation of tariff affairs, to regulation of nontariff trade barriers such as quotas and standards, regulation of unfair trade practices such as dumping, subsidization, or counterfeiting, provision of temporary relief from import competition and adjustment assistance, providing for bilateral and multilateral trade agreements with foreign trading partners, and responsibility for authorizing and overseeing the departments and agencies charged with implementation of the trade laws and programs.

The difficulties of retaining and exercising full control over international trade matters within the legislative branch were recognized by Congress shortly after enactment of the Smoot Hawley Tariff Act of 1930. In 1934, the Congress enacted the Reciprocal Trade Agreements Act which delegated to the President authority to negotiate international trade agreements for the reduction of tariffs. This Act, which marked the beginning of the trade agreements program for the United States, represented the first significant delegation of authority from Congress to the President with respect to international trade policy.

Since 1934, the delegation of authority from Congress to the President has varied in scope and degree, reflecting congressional concern over maintaining careful control of international trade policy. When the trade agreements negotiating authority granted to the President expired in 1967, for example, it was not renewed again until 1974. In the Trade Act of 1974, Presidential negotiating authority was substantially revised, extended to nontariff as well as tariff negotiations, and made subject to specific consultation and notification requirements both prior to and during the course of negotiation.

Due to the central role of Congress in formulating international economic policy, an understanding of U.S. international trade law and policy must begin with the statutory authorities and programs which provide the foundation for our trade policy. This document provides an overview of the current provisions of U.S. law relating to international trade, and illustrates the breadth and depth of the principal legislative authorities governing U.S. international trade.

Chapter 1: TARIFF AND CUSTOMS LAWS

Tariff Schedules of the United States

Historical background

The Tariff Schedules of the United States (TSUS) was created by section 201 of the Tariff Classification Act of 1962 [1] and became effective on August 31, 1963. The TSUS replaced titles I and II (dutiable and duty-free lists) of the Tariff Act of 1930 (19 U.S.C. 1201), which has long been considered lacking in structure and in need of modernization and simplification.

Because of the growing complexity of the tariff schedules and other provisions directly connected with the assessment of customs duties, title I of the Customs Simplification Act of 1954 [2] required the U.S. Tariff Commission to undertake a long-term project of reviewing the tariff schedules and compiling a revision and consolidation of all of their relevant provisions.[3] The final report on the project (tariff classification study) was submitted on November 15, 1960, and followed by several supplemental reports. These reports formed the basis for the new TSUS in section 201 of the Tariff Classification Act of 1962.

Structure of the schedules

The current TSUS consists of: seven schedules of imported articles grouped and classified according to their physical affinity to each other; [4] one schedule (Schedule 8), containing special classification provisions setting out specific circumstances in which articles listed in Schedules 1 through 7 may be imported totally or partially free of duty; and an Appendix, containing temporary modifications of duty-rate provisions of the first seven schedules, put into effect either by legislation or by executive action authorized under certain conditions by various trade laws.

Each schedule consists of several (numbered) parts and these, in turn, of several (alphabetized) subparts, ultimately containing individual tariff items. A tariff item ("TSUS item") is a five-digit numbered entry giving the description of an article, or a group of closely related articles, the rates of duty (or duty-free status) applicable to it, and other information needed for the proper assessment of import duties on that item.

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[1] Public Law 87-456, approved May 24, 1962.

[2] Act of September 1, 1954, ch. 1213.

[3] The statutory purposes of this revision were:

"(1) Establish schedules of tariff classifications which will be logical in arrangement and terminology and adapted to the changes which occurred since 1930 in the character and importance of articles produced in and imported into the United States and in the markets in which they are sold.

"(2) Eliminate anomalies and illogical results in the classification of articles.

"(3) Simplify the determination and application of tariff classifications." (Sec. 101(a); Customs Simplification Act of 1954).

[4] The seven schedules are: (1) Animal and vegetable products; (2) Wood and paper, printed matter; (3) Textile fibers and textile products; (4) Chemicals and related products; (5) Nonmetallic minerals and products; (6) Metals and metal products; (7) Specified products, miscellaneous and nonenumerated products.

Additional information, requirements, or definitions—largely enacted as separate statutes rather than as amendments to the Tariff Act of 1930, or promulgated by Executive action under broader statutory authority—applicable to all or several items in a subdivision (schedule, part, or subpart) of the TSUS, are set out at the head of such subdivision as "headnotes." Similarly, "general headnotes and rules of interpretation," applicable generally to the provisions of the TSUS, are set out at the beginning of the TSUS, preceding the schedules themselves.

The TSUS is no longer published as a separate document, but is subsumed in the Tariff Schedules of the United States Annotated (see below). Its publication as section 1201 of title 19 of the United States Code (with annual amendments) also ceased (except for general headnotes and rules of interpretation) with the 1979 supplement to the 1976 edition of the United States Code.

For statistical purposes, most (five-digit) TSUS items are subdivided into several statistical items containing two additional digits ("statistical suffix") in the entry number and more detailed descriptions; statistical suffixes are also added to TSUS items that are not subdivided. As appropriate, statistical headnotes are added to the schedules or to general headnotes. Tariff schedules containing these statistical annotations are known as the Tariff Schedules of the United States Annotated (TSUSA).

The TSUSA is published "at appropriate intervals" pursuant to section 201 of the Tariff Classification Act of 1962 by the U.S. International Trade Commission and contain the legal text of the TSUS, as amended, together with statistical annotations, explicitly mandated by section 484(e) of the Tariff Act of 1930, as amended.[5] At present, their publication (in loose-leaf format) is annual, with several supplements during the year.

The TSUSA has a tabular format containing eight columns, each column providing certain tariff information applicable to the tariff item in question. A sample page of the TSUSA is attached as Annex 1.

The first column, "GSP," shows whether a TSUS item is eligible for duty-free treatment under the Generalized System of Preferences, which will be discussed in greater detail below. The letter "A" in the column indicates general GSP eligibility, while the code "A*" signifies that, although the item is generally GSP eligible, duty-free treatment does not apply to imports under it from one or more beneficiary countries (as specifically listed in general headnote 3(c)(iii)). Absence of any letter in the column identifies items that are not eligible for duty-free treatment under the GSP.

The second column, "Item," contains the five-digit TSUS item number identifying the article or group of articles for tariff purposes. Each TSUS item is subject to its own duty treatment.

The third column, "Stat. Suffix," contains two digits whereby a TSUSA item is numerically identified for statistical purposes. For

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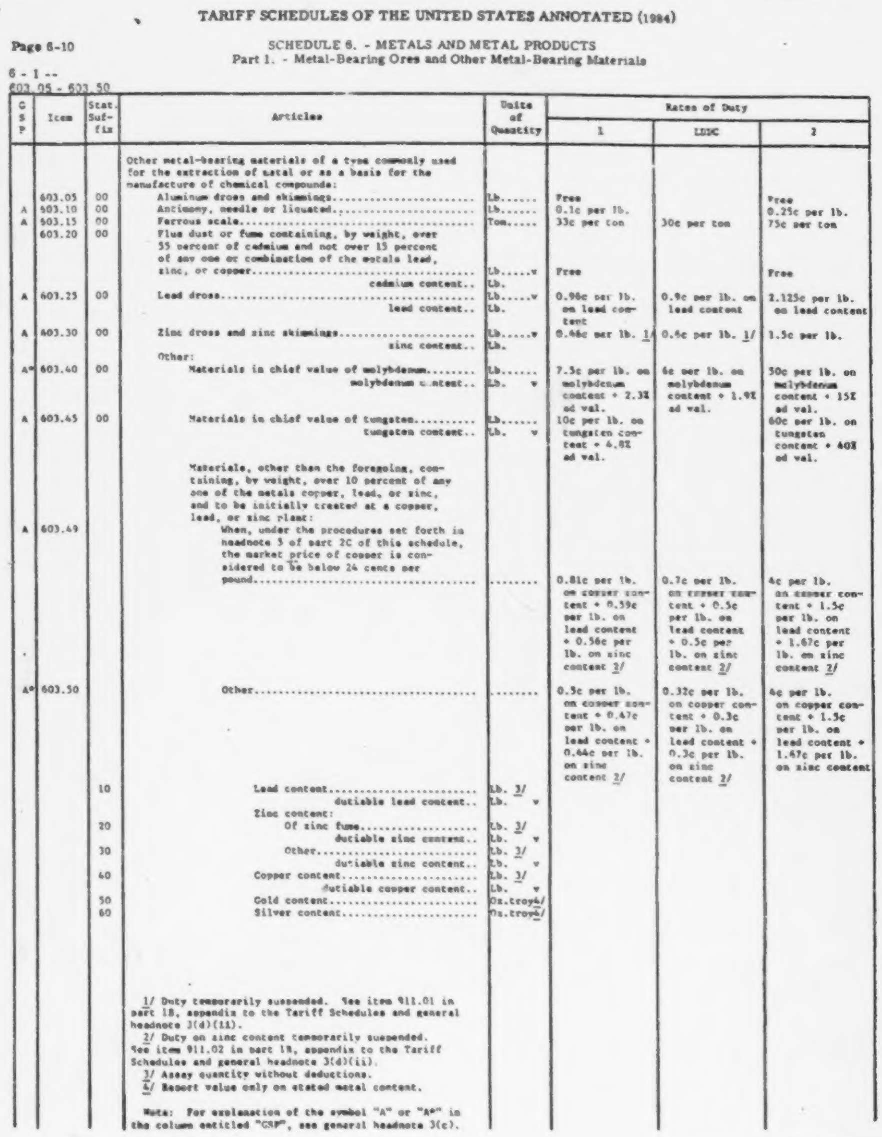
[5] 19 U.S.C. 1484(e).

TSUS items that are not statistically subdivided, the suffix 00 is used. This statistical refinement does not affect the duty status of an article: all seven-digit TSUSA items having the first five digits in common are subject to the same duty treatment.

Annex 1



TARIFF SCHEDULES OF THE UNITED STATES ANNOTATED (1984)

Page 6-10

SCHEDULE 6. - METALS AND METAL PRODUCTS
Part 1. - Metal-Bearing Ores and Other Metal-Bearing Materials

6 - 1 --
603.05 - 603.50

GSP	Item	Stat. Suffix	Articles	Units of Quantity	Rates of Duty		
					1	LDDC	2
			Other metal-bearing materials of a type commonly used for the extraction of metal or as a basis for the manufacture of chemical compounds:				
	603.05	00	Aluminum dross and skimmings	Lb.	Free		Free
A	603.10	00	Antimony, needle or liquated	Lb.	0.1¢ per lb.		0.25¢ per lb.
A	603.15	00	Ferrous scale	Ton	33¢ per ton	30¢ per ton	75¢ per ton
	603.20	00	Flue dust or fume containing, by weight, over 55 percent of cadmium and not over 15 percent of any one or combination of the metals lead, zinc, or copper cadmium content	Lb.....v Lb.	Free		Free
A	603.25	00	Lead dross lead content	Lb.....v Lb.	0.96¢ per lb. on lead content	0.9¢ per lb. on lead content	2.125¢ per lb. on lead content
A	603.30	00	Zinc dross and zinc skimmings zinc content	Lb.....v Lb.	0.46¢ per lb. 1/	0.4¢ per lb. 1/	1.5¢ per lb.
			Other:				
A*	603.40	00	Materials in chief value of molybdenum molybdenum content	Lb. Lb. v	7.5¢ per lb. on molybdenum content + 2.3% ad val.	6¢ per lb. on molybdenum content + 1.9% ad val.	50¢ per lb. on molybdenum content + 15% ad val.
A	603.45	00	Materials in chief value of tungsten tungsten content	Lb. Lb. v	10¢ per lb. on tungsten content + 6.8% ad val.		60¢ per lb. on tungsten content + 40% ad val.
			Materials, other than the foregoing, containing, by weight, over 10 percent of any one of the metals copper, lead, or zinc, and to be initially treated at a copper, lead, or zinc plant:				
A	603.49		When, under the procedures set forth in headnote 3 of part 2C of this schedule, the market price of copper is considered to be below 24 cents per pound		0.81¢ per lb. on copper content + 0.59¢ per lb. on lead content + 0.56¢ per lb. on zinc content 2/	0.7¢ per lb. on copper content + 0.5¢ per lb. on lead content + 0.5¢ per lb. on zinc content 2/	4¢ per lb. on copper content + 1.5¢ per lb. on lead content + 1.67¢ per lb. on zinc content 2/
A*	603.50		Other		0.5¢ per lb. on copper content + 0.47¢ per lb. on lead content + 0.44¢ per lb. on zinc content 2/	0.32¢ per lb. on copper content + 0.3¢ per lb. on lead content + 0.3¢ per lb. on zinc content 2/	4¢ per lb. on copper content + 1.5¢ per lb. on lead content + 1.67¢ per lb. on zinc content
		10	Lead content dutiable lead content	Lb. 3/ Lb. v			
			Zinc content:				
		20	Of zinc fume dutiable zinc content	Lb. 3/ Lb. v			
		30	Other dutiable zinc content	Lb. 3/ Lb. v			
		40	Copper content dutiable copper content	Lb. 3/ Lb. v			
		50	Gold content	Oz.troy 4/			
		60	Silver content	Oz.troy 4/			

1/ Duty temporarily suspended. See item 911.01 in part 1B, appendix to the Tariff Schedules and general headnote 3(d)(ii).

2/ Duty on zinc content temporarily suspended. See item 911.02 in part 1B, appendix to the Tariff Schedules and general headnote 3(d)(ii).

3/ Assay quantity without deductions.

4/ Report value only on stated metal content.

Note: For explanation of the symbol "A" or "A*" in the column entitled "GSP", see general headnote 3(c).

The fourth column, "Articles," contains a detailed description of the articles falling within each TSUS and TSUSA item.

The fifth column, "Units of Quantity," shows the unit in which the quantity of the article imported is to be reported for statistical purposes. In many instances, the unit of quantity is also the basis for the assessment of the duty. For several categories of products, two different reporting units must be used (e.g., for textiles, weight and square yardage; for apparel, weight and number; for metal-bearing ores, gross weight and metal content weight), the second unit of quantity usually being the basis for an import administration action (e.g., import quota, specific duty base). An "X" in this column denotes TSUSA items for which a unit of quantity need not be reported, and for which statistics are being compiled only on the basis of value.

The sixth, seventh, and eighth columns have a common heading of "Rates of Duty," and are individually marked "1," "LDDC," and "2," respectively. These are the columns in which the rates of duty (or duty-free status) generally applicable to a TSUS item are set forth. How they apply to imported products of particular countries is described below under the heading "Applicable duty treatment."

A rate of duty has two basic forms: ad valorem, and specific. An ad valorem-rate is expressed in terms of a precentage (e.g., 6.5 percent) of the value (hence, ad valorem = according to value) of the imported article; a specific rate is expressed in terms of a stated amount payable on a unit of quantity of the imported article (e.g., 17 cents per pound). In many instances, a "compound" or "mixed" rate of duty is used; that is, a combination of a specific rate and an ad valorem rate (e.g., 19 cents per pound plus 12 percent ad valorem).

Schedule 8 consists of special classification provisions permitting, in specific circumstances, totally or in a few cases partially duty-free importation of any otherwise dutiable items listed in the first seven schedules. The description of TSUS items in this schedule sets out the circumstances in which an importation takes place that confers upon it duty-free status. Schedule 8, for example, sets forth special duty treatment for articles reimported after having been exported from the United States; articles subject to various personal exemptions, such as those applicable to immigrants, foreign visitors, returning U.S. residents, foreign officials, and some other categories for entrants; articles imported by the U.S. or foreign governments, or by religious, scientific, educational, or other qualifying institutions; and samples, and articles admitted under bond.

Finally, the Appendix to the Tariff Schedules contains provisions, mostly of a temporary nature, that modify or otherwise affect the tariff treatment of specific articles in Schedules 1 through 7. The Appendix lists additional duties, and suspensions or reductions of duties, applied temporarily to certain TSUS items by legislative action; temporary executive modifications (increases or decreases) of duty rates pursuant to trade agreements or other legislation; and additional import restrictions (absolute quotas or import fees) proclaimed by the President pursuant to section 22 of the Agricultural Adjustment Act. The Appendix, however, does not list any antidumping or countervailing duties imposed under the authority of the Tariff Act of 1930, as amended, to eliminate the unfair price advantage of an import due to underpricing or foreign subsidization. Such duties are listed in the relevant parts of the Code of Federal Regulations.

Applicable duty treatment

Column 1 (MFN).—The rates of duty in column 1 of the TSUS are applicable to imports from countries that have been extended most-favored-nation (MFN) (nondiscriminatory) trade treatment by the United States, unless such imports are eligible for duty-free treatment under one of the preferential schemes discussed below (e.g., the GSP, or the Caribbean Initiative). The rates in Column 1 are concessional and have been set through reductions of full statutory rates in negotiations with other countries.

Column 2.—The rates of duty in Column 2 apply to imports from countries that have been denied MFN status by the United States (listed in general headnote 3(f)); these are full statutory rates as enacted by the highly restrictive Tariff Act of 1930. The products of the following countries are currently subject to Column 2 rates of duty:

Albania
Bulgaria
Cuba
Czechoslovakia
Estonia
German Democratic Republic and East Berlin
Indochina (any part of Cambodia, Laos, or Vietnam which may be under Communist domination or control)
Korea (any part of which may be under Communist domination or control)
Kurile Islands
Latvia
Lithuania
Outer Mongolia
Polish People's Republic
Southern Sakhalin
Tanna Tuva
Union of Soviet Socialist Republics and the area in East Prussia under the provisional administration of the Union of Soviet Socialist Republics

LDDC.—The preferential rates of duty in the "LDDC" column apply to covered products of the least developed developing countries enumerated in general headnote 3(d) of the TSUS which are not eligible for duty-free treatment under another preferential scheme. At present, the LDDC designation applies to the following 26 countries:

Bangladesh
Benin
Bhutan
Botswana
Burundi
Cape Verde
Central African Republic
Chad
Comoros
Gambia
Guinea
Haiti
Lesotho
Malawi
Maldives
Mali
Nepal
Niger
Rwanda
Somalia
Sudan
Tanzania
Uganda
Upper Volta
Western Samoa
Yemen (Sana)

The authority to provide such preferential tariff treatment in accordance with agreements reached with such less developed countries in the Tokyo Round of Multilateral Trade Negotiations (MTN) is contained in section 503(a)(2) of the Trade Agreements Act of 1979. This statute is one of several that modified the mandatory staging of duty-rate reductions negotiated under the authority of the Trade Act of 1974, provided for by section 109(a) of that Act. Most duty-rate reductions granted by the United States in the Tokyo Round of the MTN were required to be introduced in eight equal annual stages beginning on January 1, 1980, and ending on January 1, 1987. Section 503(a)(2) exempted from the staging requirement articles which the President determined not to be import sensitive and which were the product of a country included in the U.N. General Assembly's list of "least developed countries" which is also a beneficiary developing country under the U.S. Generalized System of Preferences. The President was also authorized to suspend at any time the LDDC preference, and thereby increase the duty rates in question to the level of their current MFN stage.

In proclamation 4707 of December 11, 1979, which put into effect (as of January 1, 1980) the concessions granted by the United States in the Tokyo Round of GATT negotiations, the President designated 27 countries as LDDC's and provided for the nonstaged application of duty-rate concessions to imports from them. The President determined that virtually all items on which duty-rate reductions had been granted were not import sensitive; hence, the LDDC preference was applied to only slightly fewer items than those on which concessions had been granted. For the overwhelming majority of items, the full reduction agreed to in the Tokyo Round was applied to LDDC's immediately as of January 1, 1980; for a limited number of items, the full reduction was delayed until January 1 of 1981, 1982, or even 1983. Excepted from the LDDC preference, however, were articles subject to any of the temporary modifications of duty rate contained in the Appendix to the Tariff Schedules (to which articles those modified rates apply).

These provisions were incorporated into the TSUS as general headnote 3(d), and a separate duty-rate column entitled "LDDC" was added to the TSUS format, showing the full reduced rates wherever applicable. General headnote 3(d)(ii) specifically provides that imports from LDDC's are to be dutied at rates shown in the LDDC column rather than those in Column 1 (conventional rates in effect). In order to avoid an unintended misinterpretation, this provision was later amended [6] by explicitly stating that the LDDC rates would apply only to imports that are not entitled to the more favorable duty-free treatment under the GSP.

Changes were also made in the country applicability of the LDDC preference. Executive Order 12204, effective March 30, 1980, deleted Afghanistan and Ethiopia from the LDDC list and added Uganda to it.[7] These changes were brought about by parallel changes in the list of GSP beneficiary countries coupled with the statutory provision allowing the LDDC status only for GSP beneficiary developing countries.

Special duty exemptions and preferences

In addition to the special duty preference provided for in the TSUS for products of LDDCs discussed above and the GSP and CBI programs discussed in separate sections below, several other important duty exemptions and preferences are included in the TSUS.

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[6] Proclamation No. 4792, 45 Fed. Reg. 61591 (1980).

[7] Exec. Order No. 12204, 45 Fed. Reg. 20741 (1980).

This section will briefly discuss TSUS items 800.00, 806.20, 806.30, and 807.00, which relate to various categories of American products which are returned to the United States after undergoing varying degrees of processing while abroad; general headnote 3(a), which provides for preferential tariff treatment for products of U.S. insular possessions; and duty exemptions for certain automotive imports from Canada and civil aircraft products imported from MFN countries.

American goods returned (TSUS item 800.00).—American goods may be returned to the United States duty-free under TSUS item 800.00 if they are not advanced in value or improved in condition while abroad. The courts have interpreted this provision to allow duty-free entry of American goods which had been exported for sorting, separating (e.g., by grade, color, size, etc.), culling out, and discarding defective items and repackaging in certain containers, so long as the article itself has not been the object of advancement in value or improvement in condition while abroad.

American goods repaired or altered abroad (TSUS item 806.20).—TSUS item 806.20 provides that goods exported from the United States for repairs or alterations abroad are subject to duty upon their reimportation into the United States (at the duty rate applicable to the imported article) only upon the value of such repairs or alterations. The provision applies to processing such as restoration, renovation, adjustment, cleaning, correction of manufacturing defects, or similar treatment that changes the condition of the exported article but does not change its essential character. The value of the repairs or processing for purposes of assessing duties is generally determined, in accordance with headnote 2(a) to part 1B of schedule 8, by—

(1) the cost of the repairs or alterations to the importer, or

(2) if no charge is made, the value of the repairs or alterations, as set out in the entry documents.

However, if the customs officer finds that the amount shown in the entry document is not reasonable, the value of the repairs or alterations will be determined in accordance with the valuation standards set out in section 402 of the Tariff Act of 1930 (19 U.S.C. 1401a).[8]

American metal articles processed abroad (TSUS item 806.30).—Item 806.30 provides that an article of metal (except precious metal) which is exported from the United States for processing abroad may be subject to duty on the value of the processing only upon its return to the United States. To qualify for item 806.30 treatment, the exported article (1) must have been manufactured or subjected to a process of manufacture in the United States; and (2) must be returned "for further processing" in the United States by or for the account of the original exporter.

The term "processing" refers to such operations as melting, molding, casting, machining, grinding, drilling, tapping, threading, cutting, punching, rolling, forming, plating, and galvanizing.

As in the case of articles imported under item 806.20 (repairs or alterations), discussed above, the duty on metal articles processed abroad is assessed against the value of such processing, determined in accordance with Schedule 8, Part 1B, headnote 2(a).

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[8] 19 U.S.C. 1401a

American components assembled abroad (TSUS item 807.00).—Articles assembled abroad from American-made components may be exempt from duty on the value of such components when the assembled article is imported into the United States under TSUS item 807.00. This provision enables American manufacturers of relatively labor-intensive products to take advantage of low-cost labor and fiscal incentives in other countries (usually less developed countries) by exporting American parts for assembly in such countries and returning the assembled products to the United States with partial exemption from U.S. duties.

Item 807.00 applies to articles assembled abroad in whole or in part of fabricated components, the product of the United States, which—

(1) were exported in condition ready for assembly without further fabrication;

(2) have not lost their physical identity in such articles by change in form, shape, or otherwise; and

(3) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting.

To be eligible for item 807.00 the exported article must be a fabricated U.S. component, i.e., a manufactured article ready for assembly in its exported condition, except for operations incidental to the assembly process. Whereas, integrated circuits, compressors, zippers, and precut sections of a garment are examples of fabricated components, uncut bolts of cloth, lumber, sheet metal, leather, and other materials exported in basic shapes and forms are not considered to be fabricated components for this purpose.

To be considered U.S. components, the articles do not necessarily have to be fabricated from articles or materials originating in the United States. If a foreign article or material undergoes a process of manufacture in the United States resulting in its "substantial transformation" into a new and different article, having a distinctive name, character, or use, then the component that emerges may qualify as a product of the United States for purposes of item 807.00.

The assembly operations performed abroad include any method used to join solid components together, such as welding, soldering, gluing, sewing, or fastening with nuts and bolts. Mixing, blending, or otherwise combining liquids, gases, chemicals, food ingredients, and amorphous solids with each other or with solid components is not regarded as assembling for purposes of item 807.00.

The rate of duty that applies to the dutiable portion of an assembled article is the same rate that would apply to the imported article. The assembled article is also treated as being entirely of foreign origin for purposes of any import quota or similar restriction applicable to that class of merchandise, and for purposes of country of origin marking requirements. All requirements regarding labeling, radiation standards, flame retarding properties, etc., that apply to imported products apply equally to item 807.00 merchandise.

An article imported under item 807.00 is treated as a foreign article for appraisement purposes. That is, the full appraised value of the article must first be determined under the usual appraisement provisions. The dutiable value, however, is determined by deducting the cost or value of the American-made fabricated components from the appraised value of the assembled merchandise.

Products from U.S. insular possessions (General Headnote 3(a)).—Imports from the Virgin Islands, Guam, American Samoa, Wake Island, Kingman Reef, Johnson Island, and Midway Islands are entitled to duty-free entry under certain conditions, designed to promote the economic development of these U.S. insular possessions. This provision does not apply to Puerto Rico which is part of the "customs territory of the United States."

As provided in General Headnote 3(a) of the Tariff Schedules, an article imported directly from a possession is exempt from duty if—

(1) it was grown or mined in the possession; or

(2) it was produced or manufactured in the possession, and the value of foreign materials contained in that article does not exceed 70 percent of its total value. Materials of U.S. origin are not considered foreign for this purpose. Likewise, materials that could be imported into the United States duty-free (except from Cuba or the Philippines) are not counted as foreign materials for purposes of the 70 percent foreign-content limitation; or

(3) in the case of any article excluded from duty-free treatment under section 213(b) of the Caribbean Basin Economic Recovery Act, it was produced or manufactured in the possession, and the value of foreign materials does not exceed 50 percent of its total value.

In addition, an article previously imported into the United States with duty or tax paid thereon, shipped to a possession without benefit of remission, refund, or drawback of such duty or tax, may be returned to the United States duty-free. General Headnote 3(a) also provides that articles from insular possessions are entitled to no less favorable duty treatment than that accorded to eligible articles under the Generalized System of Preferences, described below.

In applying the 70 percent foreign-materials test, Customs determines the value of the foreign materials by their actual purchase price, plus the transportation cost to the possession, excluding any duties or taxes assessed by the possession and excluding any post-landing charges. The value thus determined is then compared with the appraised value of the products imported into the United States, determined in accordance with the usual appraisement methods. If the differential is 30 percent or more, the foreign materials limitation is satisfied. This procedure is set out in 19 C.F.R. 7.8(d).

As previously noted, the product imported from a possession must have been produced or manufactured there (unless grown or mined there). It is not sufficient for foreign goods to be shipped to a possession for nominal handling or manipulation, followed by a price mark-up to meet the 70 percent test.

Canadian motor vehicles and original equipment therefor (headnote 2, part 6B, schedule 6).—Throughout the TSUS are a number of specific provisions which provide for duty-free treatment of imported motor vehicles and specified original equipment parts that qualify as "Canadian articles" under General Headnote 3(d) and headnote 2 to part 6B of schedule 6. These provisions were added to the TSUS pursuant to the Automotive Products Trade Act of 1965,[9] which was enacted to implement the U.S.-Canadian Automotive Agreement. The purpose of the Agreement was to create a North American common market for motor vehicles and original equipment parts (replacement parts are not covered).

The term "Canadian article" refers to an article produced in Canada but does not include any article produced with non-Canadian or non-U.S. materials if the CIF value (Canadian port)[10] of such foreign-source materials exceeds 50 percent of the appraised value of the article imported into the United States.

Most of the product categories established by the Automotive Products Trade Act are applicable to "original motor-vehicle equipment," which is defined in headnote 2, part 6B, schedule 6 as a Canadian fabricated component intended for use as original equipment in the manufacture of a motor vehicle in the United States and which was obtained from a Canadian supplier pursuant to "a written order, contract, or letter of intent of a bona fide motor-vehicle manufacturer in the United States." In turn, the phrase "bona fide motor-vehicle manufacturer" is defined as a person determined by the Secretary of Commerce to have produced at least 15 motor vehicles in the previous 12 months and to have the capacity to produce at least 10 motor vehicles per week.

Civil aircraft products (headnote 3, part 6C, schedule 6).—Title VI of the Trade Agreements Act of 1979 gave the President the authority to proclaim new headnote 3 to part 6C of schedule 6 and to make specific headnotes to designated TSUS items in order to implement the Tokyo Round Agreement on Trade in Civil Aircraft and to provide duty-free treatment, in accordance with the annex to the Agreement, for the civil aircraft articles described therein. These changes were implemented by Presidential Proclamation 4707 of December 11, 1979.

The provisions work much like those implementing the U.S.-Canadian automotive pact in that a number of specific product breakouts are spread throughout the TSUS providing duty-free treatment for specifically described articles which are "certified for use in civil aircraft" in accordance with headnote 3 to part 6C of schedule 6. That headnote defines "civil aircraft" as all aircraft other than that purchased by the Department of Defense or the U.S. Coast Guard and sets out the three criteria for an imported aircraft product to qualify for duty-free treatment. The importer must certify that—

(1) the article has been imported for use in civil aircraft;

(2) that it will be so used; and

(3) that the article has been approved for such use by the Administrator of the Federal Aviation Administration or by the airworthiness authority in the country of exportation (if the FAA recognizes it as an acceptable substitute) or that applica-

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[9] Public Law 89-283, 19 U.S.C. 2001, et seq.

[10] The term CIF stands for "costs, insurance and freight" and means that the value of the article is based on its landed cost at the Canadian port.

tion for such approval has been made to and accepted by the FAA.

Section 234 of the Trade and Tariff Act of 1984 enacted on October 30, 1984, gave the President the authority to make additional tariff breakouts in designated TSUS items in order to provide duty-free coverage comparable to the expanded coverage provided by all other signatories to the Aircraft Agreement pursuant to the extension of the Annex to the Agreement agreed to in Geneva on October 6, 1983.

Generalized System of Preferences

Title V of the Trade Act of 1974, as Amended

The concept of a Generalized System of Preferences (GSP) was first introduced in the United Nations Conference on Trade and Development (UNCTAD) in 1964. Developing countries asserted that one of the major impediments to accelerated economic growth and development was their inability to compete on an equal basis with developed countries in the international trading system. Through tariff preferences in developed country markets, the LDCs claimed they could increase exports and foreign exchange earnings needed to diversify their economies and reduce dependence on foreign aid.

After several international meetings and long internal debate, in 1968 the United States joined other industrialized countries in supporting the concept of GSP. As initially conceived, GSP systems were to be: (1) temporary, unilateral grants of preferences by developed to developing countries; (2) designed to extend benefits to sectors of developing countries which were not competitive internationally; and (3) designed to include safeguard mechanisms to protect domestic industries sensitive to import competition from articles receiving preferential tariff treatment. In the early 1970's, 19 other members of the Organization for Economic Cooperation and Development (OECD) also instituted and have since renewed GSP schemes.

In order to implement their GSP systems, the developed countries obtained a waiver from the most-favored-nation (MFN) clause of Article I of the General Agreement on Tariffs and Trade (GATT), which provides that trade must be conducted among countries on a nondiscriminatory basis. A 10-year MFN waiver was granted in June 1971 through the "enabling clause" of the Texts Concerning a Framework for the Conduct of World Trade concluded in the Tokyo round of GATT Multilateral Trade Negotiations. The enabling clause, which has no expiration date, provides the legal basis for "special and differential" treatment for developing countries. The enabling clause also requires that developing countries accept the principle of graduation, under which such countries agree to assume "increased GATT responsibilities as their economies progress."

U.S. GSP basic authority

Statutory authority for the U.S. Generalized System of Preferences is set forth in title V of the Trade Act of 1974, as amended.[11] Authority to grant GSP duty-free treatment on eligible articles from beneficiary developing countries (BDCs) became effective under that Act on January 3, 1975, for a 10-year period expiring on January 3, 1985. The program was actually implemented on January 1, 1976 under Executive Order 11888. Relatively minor amendments to the statute were made under section 1802 of the Tax Reform Act of 1976 [12] and section 1111 of the Trade Agreements Act of 1979.[13] Title V of the Trade and Tariff Act of 1984 [14] renewed the GSP program for 8½ years until July 4, 1993, with significant amendments effective on January 4, 1985, particularly in the criteria for designating beneficiary countries and limitations on duty-free treatment.

The U.S. Trade Representative (USTR) administers the GSP program through an interagency committee to advise the President on GSP product and country eligibility.

Section 501 of the Trade Act of 1974 as amended authorizes the President to provide GSP duty-free treatment on any eligible article from designated beneficiary developing countries, subject to certain conditions and limits, having due regard for (1) the effect of such action on furthering the economic development of developing countries through the expansion of their exports; (2) the extent other major developed countries are undertaking a comparable effort to assist developing countries by granting generalized preferences on their products; (3) the anticipated impact on U.S. producers of like or directly competitive products; and (4) the extent of the BDC's competitiveness with respect to eligible articles. The program currently provides duty-free treatment on imports of about 3,000 articles from 140 developing countries.

Designation of beneficiary developing countries

The following developed countries are prohibited under section 502(b) as amended by the 1984 Act from designation as BDCs:

Australia
Austria
Canada
Czechoslovakia
European Economic Community member states
Finland
Germany (East)
Iceland
Japan
Monaco
New Zealand
Norway
Poland
Republic of South Africa
Sweden
Switzerland
Union of Soviet Socialist Republics

The President is also prohibited from designating any country for GSP benefits which:

(1) Is a communist country unless (a) its products receive nondiscriminatory (MFN) treatment; (b) it is a Contracting Party to the GATT and a member of the International Mone-

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[11] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2461-2465.
[12] Public Law 94-455, approved October 4, 1976, 19 U.S.C. 2462.
[13] Public Law 96-39, approved July 26, 1979, 19 U.S.C. 2462-2464.
[14] Public Law 98-573, title V, approved October 30, 1984.

tary Fund; and (c) it is not dominated or controlled by international communism.

(2) Has nationalized or expropriated U.S. property, including patents, trademarks, or copyrights, unless the President determines and reports to Congress there is adequate compensation, negotiations underway to provide compensation, or a dispute over compensation is in arbitration.

(3) Fails to recognize as binding or enforce arbitral awards in U.S. favor.

(4) Affords "reverse preferences" to other developed countries likely to have a significant adverse impact on U.S. commerce.

(5) Is a member of OPEC or other arrangement and withholds supplies of vital commodity resources or raises their price to unreasonable levels, causing serious disruption of the world economy. Under a 1979 amendment, countries which entered bilateral product-specific agreements with the United States prior to January 3, 1980 (i.e., Venezuela, Ecuador, and Indonesia) are exempt from this condition unless they subsequently interrupt or terminate oil supplies to the United States.

(6) Does not take adequate steps to cooperate in preventing illegal drug traffic into the United States.

(7) Aids or abets international terrorism.

(8) Has not taken or is not taking steps to afford internationally recognized workers rights to its workers.[15]

The President may waive conditions (4), (5), (6), (7), and (8) if he determines and reports with reasons to the Congress that designation of the particular country is in the national economic interest.

In addition, the President must take certain other factors into account under section 502(c) as amended by the 1984 Act in designating BDCs: an expressed desire of the country to be designated; the country's level of economic development; whether other major developed countries extend GSP to the country; the extent the country has assured the United States it will provide "equitable and reasonable access" to its markets and basic commodity resources and refrain from engaging in unreasonable export practices; the extent the country is providing adequate and effective means for foreign nationls to secure, exercise, and enforce exclusive rights in intellectual property; the extent the country has taken action to reduce distorting investment practices and policies and reduce or eliminate barriers to trade in services; and whether the country has taken or is taking steps to afford its workers internationally recognized worker rights.

Before designating any beneficiary country, the President must notify the Congress of his intention and the considerations entering his decision. Before terminating designation of any beneficiary, the

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[15] Defined by amendment under section 503 of the 1984 Act for purposes of GSP to include:
"(A) the right to association;
"(B) the right to organize and bargain collectively;
"(C) a prohibition on the use of any form of forced or compulsory labor;
"(D) a minimum age for the employment of children; and
"(E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health".

President must provide the Congress and the country concerned at least 60 days advance notice of his intention, together with the reasons. The President must withdraw or suspend the designation if he determines the country no longer meets the conditions for designation.

Eligible articles

The President designates articles under section 503 eligible for GSP duty-free treatment after considering advice required through public hearings, from the International Trade Commission (ITC) on the probable domestic economic impact, and from Executive branch agencies.

GSP duty-free treatment is prohibited by statute on textile and apparel articles subject to textile agreements; watches; import-sensitive electronic articles; import-sensitive steel articles; footwear, handbags, luggage, flat goods, (e.g., wallets, change purses, eyeglass cases), work gloves, and leather wearing apparel which were ineligible for GSP as of April 1, 1984; and import-sensitive semi-manufactured and manufactured glass products. Articles are ineligible for GSP during any period they are subject to import relief under sections 201–203 of the Trade Act of 1974 or to national security actions under section 232 of the Trade Expansion Act of 1962.

The President must also exclude any other articles he determines to be import sensitive in the context of GSP. In order to administer this requirement, the USTR has established by regulation an interagency procedure for annual review of petitions from any interested party to have new articles added to, or removed from, the GSP list. The committee also considers modifications on its own motion.

GSP duty-free treatment applies only to an eligible article which meets the following rule-of-origin requirements:

(1) The article must be imported directly from a BDC into the U.S. customs territory; and

(2) The sum of (a) the cost or value of materials produced in a beneficiary country, plus (b) the direct cost of processing performed in such country is not less than 35 percent of the appraised value of the article when it enters into the U.S. customs territory.

Materials and processing costs in two or more countries which are members of the same association of countries which is a customs union or free trade area may be treated as one BDC and cumulated to meet the 35 percent minimum local content. Materials imported into a BDC may be counted toward the 35 percent minimum valued-added requirement only if they are substantially transformed into new and different articles in the BDC.

Limitations on preferential treatment

The President has general authority under section 504(a) to withdraw, suspend, or limit application of GSP and restore MFN duties with respect to any article or any country after considering the factors in section 501 and 502(c), but he cannot establish any intermediate rates of duty. Since 1981, this authority has been used in the context of the annual interagency review process for "discretionary graduation" from GSP of particular products from particular countries which have demonstrated their competitiveness and to promote a shifting of benefits to less advanced developing countries.

In addition to the annual review of petitions on article eligibility and discretionary graduation of particular products from particular countries, section 504 as amended by the 1984 Act applies statutory "competitive need" limitations of GSP duty-free treatment, subject to waiver under certain conditions. The basic purposes of the competitive need limitations are to (1) establish a benchmark for determining when products from particular countries are competitive in the U.S. market and therefore no longer need preferential tariff treatment; and (2) to reallocate GSP benefits to less competitive producers. The limits have also provided some measure of protection to domestic producers of like or directly competitive products.

Under the competitive need limits, if imports of a particular article from a particular BDC exceed either (1) a value level adjusted annually in relation to changes in the U.S. gross national product (GNP) (increased from $25 million in 1974 to about $57 million in 1983) or (2) 50 percent of total U.S. imports of the article in a particular calendar year, GSP treatment on that article from that country must be removed and the normal rate of duty imposed on all imports of the article from that country by July 1 of the following year. GSP treatment may be reinstated in a subsequent calendar year if imports of the product from the excluded country have fallen below the competitive need ceilings then in effect during the preceding calendar year.

There are four statutory circumstances in which competitive need limits may not apply:

> (1) If the President determines that an article like or directly competitive with a particular GSP article was not produced in the United States on January 3, 1985, then that GSP product is exempt from the 50-percent, but not the dollar value, competitive need limit.
>
> (2) The President may waive the 50-percent, but not the dollar, competitive need limit on articles for which total U.S. imports are de minimis, i.e., not more than $5 million during the preceding calendar year indexed annually to changes in the U.S. GNP since 1979.
>
> (3) Neither of the competitive need limits applies after at least 60 days advance notice to the Congress to any BDC the President determines to be a least developed developing country.
>
> (4) The President may waive the competitive need limits for a particular country based on a determination that (a) there has been an historical preferential trade relationship between the United States and such country; (b) there is a treaty or trade agreement in force covering economic relations between such country and the United States; and (c) such country does not discriminate against or impose unjustifiable or unreasonable barriers to U.S. commerce. This waiver authority which was designed for possible exemption of the Philippines, has never been utilized.

As amended by the 1984 Act, section 504 requires the President to conduct a general review of eligible articles by January 4, 1987, and periodically thereafter, and report to the Congress by January

4, 1988, on the actions he has taken to withdraw, suspend, or limit GSP benefits for failure to take actions described in the country designation criteria.

If, after any general product review, the President determines that a country has demonstrated a sufficient degree of competitiveness in a particular article relative to other BDCs, then he must reduce the competitive need limits on that article from that country to $25 million, adjusted annually to changes in the U.S. GNP since 1974, and 25 percent of total U.S. imports of the article.

The President may waive competitive need limits on any article as of January 4, 1987, if he (1) receives ITC advice on whether any U.S. industry is likely to be adversely affected; (2) determines a waiver is in the national economic interest based upon the country designation factors under section 501 and 502(c) as amended; and (3) publishes his determination. In making the national interest determination the President must give great weight to (1) assurances of equitable and reasonable market access in the BDC; and (2) the extent the country provides adequate and effective intellectual property rights protection. Total waivers for all countries above existing competitive need limits cannot exceed 30 percent of total GSP duty-free imports in any year, of which not more than one-half (i.e., 15 percent of total GSP duty-free imports) may apply to waivers on articles from countries which account for at least a 10 percent share of total GSP duty-free imports or have a per capita GNP of $5,000 or more in that year.

Any BDC which reaches a per capita GNP level of $8,500 in a particular calendar year, indexed annually by 50 percent of the annual change in U.S. GNP since 1984, must be graduated from GSP on all eligible articles over a 2-year phaseout period.

Other provisions

Section 505 as amended by the 1984 Act requires the President to submit a report to the Congress on the operation of the GSP program by January 4, 1990, as well as an annual report on the status of internationally recognized worker rights within each BDC.

Section 506 as added by the 1984 Act requires appropriate U.S. agencies to assist BDCs to develop and implement measures designed to assure that the agricultural sectors of their economies are not directed to export markets to the detriment of foodstuff production for their own citizens.

Caribbean Basin Initiative (CBI)

CARIBBEAN BASIN ECONOMIC RECOVERY ACT

The Caribbean Basin Economic Recovery Act,[16] commonly referred to as the Caribbean Basin Initiative or CBI, was enacted on August 5, 1983, authorizing certain U.S. unilateral and preferential trade and tax measures for Caribbean Basin countries and territories.

The United States developed this program for responding to the economic crisis in the Caribbean in close consultation with governments and private sectors of potential recipients and with other donor countries in the region. On February 24, 1982, President Reagan outlined the CBI before the Organization of American States and on March 17, 1982, he first submitted this plan to the Congress. H.R. 2397 containing amended versions of the trade and tax proposals, was passed by the House of Representatives in the 97th Congress on December 17, 1982, but was not acted on by the Senate. The President resubmitted the House-passed version of the plan on February 23, 1983; the Initiative as further amended became title II of the conference report on H.R. 2973, to repeal the withholding of tax from interest and dividends, agreed to by both Houses on July 28, 1983. Separate foreign assistance legislation increased aid to the region as the third element of the program.

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[16] Public Law 98-67, title II, approved August 5, 1983, 19 U.S.C. 2701 et seq.

The centerpiece of the CBI is authority granted to the President under the Act for 12 years, until September 30, 1995, to provide unilateral duty-free treatment on U.S. imports of eligible articles from designated Caribbean Basin countries and territories. Duty-free treatment became effective as of January 1, 1984, for imports from 20 designated beneficiary countries.[17]

Beneficiary countries or territories

Section 212 of the Act lists the following 27 countries and territories as potentially eligible for designation by the President as CBI beneficiary countries:

Anguilla
Antigua and Barbuda
Bahamas, The
Barbados
Belize
Cayman Islands
Costa Rica
Dominica
Dominican Republic
El Salvador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Montserrat
Netherlands Antilles
Nicaragua
Panama
Saint Christopher-Nevis
Saint Lucia
Saint Vincent and the Grenadines
Suriname
Trinidad and Tobago
Turks and Caicos Island
Virgin Islands, British

A country or territory cannot be designated as a beneficiary of CBI trade or tax benefits if it:

(1) Is a Communist country;

(2) Has nationalized or expropriated U.S. property including any patent, trademark, or other intellectual property without compensation or submission to arbitration;

(3) Fails to recognize awards arbitrated in favor of U.S. citizens;

(4) Affords preferential tariff treatment to products of other developed countries that has or is likely to have a significant adverse effect on U.S. commerce;

(5) Broadcasts U.S. copyrighted material without the owners' consent;

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[17] Anguilla, the Bahamas, Caymen Islands, Guyana, Nicaragua, Suriname, and the Turks and Caicos Island were not designated in Presidential Proclamation 5133 as amended December 29, 1983.

(6) Does not cooperate with U.S. efforts to prevent drugs from entering the United States unlawfully; and

(7) Has not signed an extradition agreement with the United States.

The President may waive conditions (1), (2), (3), and (5) if he determines that designation of the particular country would be in the national economic or security interest of the United States and so reports to the Congress.

In addition, the President must take into account certain other factors under section 212(c) in determining whether to designate a country a CBI beneficiary: the country's desire to be designated; economic conditions and living standards in the country; the extent the country will afford reasonable access to U.S. products and observes international trading rules; the degree the country uses export subsidies or imposes export performance or local content requirements; the degree the country's trade policies contribute to region revitalization and the country is undertaking self-help measures; the degree its workers enjoy reasonable workplace conditions and collective bargaining rights; the extent the country prohibits its nationals from broadcasting copyrighted materials without permission; the extent the country provides adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property; and the extent to which the country is prepared to cooperate in the administration of the CBI.

The President must notify the Congress of his intention to designate countries, together with the considerations entering the decision. He must provide at least 60 days advance notice to the Congress and to the country concerned of his intention to terminate a designation together with the considerations.

Eligible articles

CBI duty-free treatment under section 213(a) of the Act applies only to an article which meets three "rule of origin" requirements:

(1) The article must be imported directly from a beneficiary country into the U.S. customs territory;

(2) The article must contain a minimum 35 percent local content of one or more beneficiary countries (up to 15 percent of the total value of the articles from U.S.-made materials may count toward the 35 percent requirement); and

(3) The article must be wholly the growth, product, or manufacture of a beneficiary country, or, if it contains foreign materials, be substantially transformed into a new or different article in a beneficiary country.

Other provisions and regulations preclude minor pass through operations or transshipments from qualification.

Section 213(b) exempts the following articles from duty-free treatment: textiles and apparel, footwear, handbags, luggage, flat goods (such as wallets, change purses and key and eyeglass cases) work gloves, leather wearing apparel, canned tuna, petroleum and petroleum products, and watches and watch parts contain-components from Communist countries.

Whenever a Presidential proclamation pursuant to section 22 of the Agricultural Adjustment Act to protect a U.S. sugar price support program is in effect, duty-free treatment on sugar imports from all CBI beneficiary countries except the Dominican Republic, Guatemala, and Panama is subject to the "competitive need limitations" in effect under the Generalized System of Preferences program or, if the country so requests, to absolute quotas set by the President. Sugar imports from the three countries are subject to duty-free absolute quotas. The President may adjust or suspend any of the limits or duty-free treatment depending on U.S. market conditions or to protect the price support program. More restrictive quota programs proclaimed under other provisions of law take precedence over the limits of the Act.

Section 213(c) requires the President to suspend duty-free treatment on imports of sugar and beef products from any beneficiary country that does not submit a satisfactory stable food production plan within 90 days after its designation, or while the country is not making a good faith effort to implement the plan or the plan is not achieving its purpose. The President must withhold suspension if the country agrees to consultations within a reasonable period of time and undertakes to formulate and implement remedial action.

The import relief procedures and authorities under section 201–203 of the Trade Act of 1974 and national security measures under section 232 of the Trade Expansion Act of 1962 apply to imports from CBI beneficiary countries. Section 213(e) authorizes the President to suspend CBI duty-free treatment and proclaim a rate of duty or other relief measures as on imports of the article from other countries. Alternatively, the President may maintain duty-free treatment or establish a margin of preference on imports from CBI countries. In its report to the President on import relief investigations covering CBI eligible articles, the International Trade Commission (ITC) must state whether its findings with respect to serious injury to the domestic industry and its recommended remedy apply to imports from CBI beneficiary countries.

Under a special procedure under section 213(b) petitioners for import relief on agricultural perishable products may also file a request with the Secretary of Agriculture for emergency relief. Within 14 days the Secretary must determine whether there is reason to believe a CBI perishable product is being imported in such increased quantities as to be a substantial cause of serious injury to the domestic industry, and recommend to the President emergency relief if warranted. The President must determine within 7 days after receiving the Secretary's recommendation whether to take emergency action restoring the normal rate of duty pending final action on the import relief petition.

Section 215 requires the ITC to report annually to the Congress on the actual economic impact and assess the probable future effects of the Act on the U.S. economy generally and on specific domestic industries. Section 216 also requires an annual report to the Congress by the Secretary of Labor on the impact of the CBI on U.S. labor. Section 217 requires a feasibility study by the Secretary of State of establishing a Caribbean Trade Institute in Harlem, New York City.

Measures for Puerto Rico and U.S. insular possessions

The Act contains a number of provisions to maintain and improve the competitive position of Puerto Rico and the U.S. insular possessions (including the Virgin Islands, American Samoa, Guam):

(1) Imports from Puerto Rico and the Virgin Islands may be counted toward the 35 percent minimum local content rule of origin requirement for CBI duty-free treatment. Section 235 of the Tariff and Trade Act of 1984 amended section 213(a) also to permit articles from CBI beneficiary countries to enter under bond for processing or manufacture in Puerto Rico without payment of duty upon withdrawal if they meet CBI rule of origin requirements.

(2) The permissible foreign content is increased from 50 to 70 percent for duty-free treatment of imports of CBI eligible articles from U.S. insular possessions under general headnote 3(a) of the Tariff Schedules of the United States.

(3) Duty-free entry of alcoholic beverages by returning U.S. residents arriving directly from insular possessions is increased from 4 to 5 liters provided at least one liter is the product of an insular possession.

(4) Section 221 amends section 7652 of the Internal Revenue Code to require that all excise taxes collected on foreign rum imported into the United States, whether or not from Caribbean countries, be paid to the treasuries of Puerto Rico and the Virgin Islands. Section 214(c) requires the President to consider compensatory measures for the governments of Puerto Rico and the Virgin Islands if there is a reduction in the amount of rum excise tax rebates.

(5) The term "industry" under the import relief provisions of section 201 of the Trade Act of 1974 is clarified to enable producers in the insular possessions to petition for import relief.

(6) Nontoxic rum stillage discharges in the Virgin Islands are exempt from certain provisions of the Federal Water Pollution Control Act if the discharges are 1,500 feet from the shore and are determined by the Governor of the Virgin Islands not to constitute a health or environmental hazard.

Tax measures

Section 222 of the Act amends section 274(h) of the Internal Revenue Code to allow deductions for business expenses incurred while attending conventions and meetings in a designated Caribbean Basin beneficiary country (or Bermuda) if it enters into an executive agreement with the United States to provide, on a reciprocal basis, for information relating to U.S. tax matters to be made available to U.S. tax officials, including agreement to exchange bearer share and bank account information for criminal tax purposes. No deduction is available for attending a convention in a country found by the Secretary of the Treasury to discriminate in its tax laws against conventions held in the United States. The provision applies to conventions beginning after June 30, 1983, if an exchange of information agreement is in effect.

The Secretary of the Treasury was required to report within 90 days after enactment of the Act on the level at which Caribbean Basin tax havens are being used to evade or avoid Federal taxes and the effect on Federal revenues of such use, any information on the relationship of such use to drug trafficking and other criminal activities, and on current anti-tax haven enforcement activities of the Department of the Treasury.

Customs Valuation

Historical background

In order to assess applicable duty rates under the Tariff Schedules of the United States (TSUS) and to collect appropriate import statistics, the dutiable value of all imported merchandise must be determined. The process by which Customs determines the dutiable value of imported merchandise is referred to as "appraisement" or "valuation."

Merchandise exported to the United States on or after July 1, 1980, is subject to appraisement under a new, uniform system of valuation established by title II of the Trade Agreements Act of 1979. Title II, which implements the Customs Valuation Agreement (entitled the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade) negotiated as one of the Tokyo Round MTN trade agreements, was put into effect by Presidential Proclamation 4768 of June 28, 1980.[18]

Title II revised section 402 of the Tariff Act of 1930 [19] and repealed the American Selling Price (ASP) method of valuation. However, under section 204(c) of the Trade Agreements Act of 1979, the ASP method of valuation would continue to apply to certain rubber footwear exported to the United States before July 1, 1981. Title II also repealed the alternative valuation system under section 402a of the Tariff Act of 1930.[20]

Prior to the Trade Agreements Act, the U.S. valuation system was complicated by the fact that two separate valuation standards existed side-by-side—commonly referred to as the "old law" and the "new law." Section 402a of the Tariff Act of 1930 was called the "old law" because it was enacted as part of the original Tariff Act of 1930. It provided for the following order of progression in appraising merchandise: (1) foreign value or export value, whichever is higher; (2) United States value; (3) cost of production.

It also provided for the application of the American Selling Price (ASP) basis of appraisement for certain designated articles such as benzenoid chemicals and certain footwear. The ASP method was based on the value of a domestically produced product rather than the imported product in order to provide greater protection to the U.S. industry from foreign competition.

During the early 1950's the Department of the Treasury proposed the elimination of the Foreign Value basis of appraisement, which as its name implies is based on the value of merchandise sold in foreign markets. The Department of the Treasury argued that data to determine Export Value were more readily available and the elimination of Foreign Value would streamline the appraisement process by obviating the need to make simultaneous appraisements under Export Value and Foreign Value.

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[18] 45 Fed. Reg. 45135 (1980).

[19] 19 U.S.C. 1401a.

[20] 19 U.S.C. 1402.

In response to these proposals, the Customs Simplification Act of 1956 created in effect a new group of valuation standards. These standards were contained in section 402 of the Tariff Act of 1930[21] and referred to as the "new law." The "new law" eliminated the Foreign Value standard and made Export Value the primary basis of appraisement. With certain modifications, both U.S. Value and Cost of Production (renamed the Constructed Value) were retained as the first and second alternative standards. The meaning of each of the standards was modified, however, by changes in the statutory language and by the inclusion in the law of definitions for certain of the terms.

However, the Congress was unwilling to make the changes applicable to all imported articles. Because the new provisions were expected to have a duty-reducing effect for many articles, the Secretary of the Treasury was instructed to prepare a list of commodities which, if appraised under the new valuation standards, would have been appraised at 95 percent or less of the value at which they were actually appraised in the 12 months ending June 30, 1954 (i.e., dutiable value reduced by 5 percent or more). The articles so identified were published in Treasury Decision 54521 (January 20, 1958), which is referred to as "the Final List" and such articles were to continue to be appraised under the "old law" standards which remained in section 402a of the Tariff Act. Thus, after the enactment of the Customs Simplification Act of 1956,[22] there were now nine separate bases of appraisement (five under the old law and four under the new) which could be applicable to imported products.

It was largely this complexity of U.S. valuation laws as well as foreign objections to the American Selling Price basis of appraisement which prompted many of our trading partners to enter into negotiations at the Tokyo Round of the MTN on the development of a new system of customs valuation.

The GATT Valuation Agreement

The Customs Valuation Agreement, which was signed by most major U.S. trading partners at the conclusion of the Tokyo Round of MTN negotiations,[23] consists of four major parts in addition to a preamble and three annexes. Part I sets out the substantive rule of customs valuation, the substance of which was codified in U.S. law by the Trade Agreements Act of 1979 as an amendment to section 402 of the Tariff Act of 1930. Part II provides for the international administration of the agreement and for dispute resolution among signatories. Part III provides for special and differential treatment for developing countries, and Part IV contains so-called final provisions dealing with matters such as acceptance and accession of the agreement, reservations and servicing of the agreement.

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[21] 19 U.S.C. 1401a.

[22] Act of August 2, 1956, ch. 887.

[23] Current signatories to the Valuation Agreement are: Argentina; Australia; Austria; Belgium; Brazil *; Canada *; Czechoslovakia; Denmark; Finland; France; Germany, Federal Republic of; Greece; Hungary; India *; Ireland; Italy *; Korea, Republic of *; Luxembourg; Netherlands; New Zealand; Norway; Romania; Spain *; South Africa; Sweden; Switzerland; United Kingdom; United States; and Yugoslavia.

Asterisk denotes those signatories subject to resolution allowing for delayed implementation.

Administration and dispute resolution.—As mentioned above, the agreement establishes two committees—a "Committee on Customs Valuation" (referred to as "the Committee") and a "Technical Committee on Customs Valuation" (referred to as the "Technical Committee")—to administer the agreement and creates a mechanism for resolving disputes between parties to the agreement.

The Committee, which is to be composed of representatives from each of the parties, meets annually in Geneva "to consult on matters relating to the administration of the customs valuation system by any party to Agreement as it might affect the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the parties." The GATT secretariat acts as the secretariat to the Committee and the Office of the U.S. Trade Representative is the U.S. representative to this Committee.

The Technical Committee was created under the auspices of the Customs Cooperation Council (CCC) to carry out the responsibilities assigned to it by the parties and set forth in Annex II to the agreement with a view towards achieving uniformity in interpretation and application of the agreement at the technical level. Among the responsibilities assigned to the Technical Committee are—

(i) to examine specific technical problems arising in the administration of the customs valuation systems and to give advisory opinions offering solutions to such problems;

(ii) to study, as requested and prepare reports on valuation laws, procedures and practices as they relate to the agreement; and

(iii) to furnish such information and advice on customs valuation matters as may be requested by parties to the agreement.

The Technical Committee meets periodically in Brussels and the U.S. Customs Service serves as the U.S. representative to this technical committee.

Dispute resolution.—Several steps are provided for a party to follow if it considers that any benefit accruing to it under the agreement is being nullified or impaired or if any objectives of the agreement are being impeded by the actions of another party. First, the aggrieved party should request consultations with the party in question with a view to reaching a mutually satisfactory solution.

If no mutually satisfactory solution is reached between the parties within a reasonably short period of time, the Committee shall meet at the request of either party (within 30 days of receiving such request) and attempt to facilitate a mutually satisfactory solution. If the dispute is of a technical nature, the Technical Committee will be asked to examine the matter and report to the Committee within 3 months.

In the absence of a mutually agreeable solution from the Committee up to this point, the Committee shall, upon the request of either party, establish a panel (within 3 months from the date of the parties' request for the Committee to investigate where the matter is not referred to the Technical Committee, otherwise within 1 month from the date of the Technical Committee's report) to examine the matter and make such finding as will assist the

Committee in making recommendations or giving a ruling on the matter.

After the investigation is complete, the Committee shall take appropriate action (in the form of recommendations or rulings). If the Committee considers the circumstances to be serious enough, it may authorize one or more parties to suspend the application to any other party of obligations under the valuation agreement.

Special and differential treatment.—Part III of the agreement allows developing countries which are party to the agreement—

(i) to delay application of its provisions for a period of five years from the date the agreement enters into force;

(ii) to delay application of articles 1, 2(b)(iii) and 6 (both of which provide for a determination of the computed value of imported goods) for a period of three years; and

(iii) to receive technical assistance (such as training of personnel, assistance in preparing implementation measures and advice on the application of the agreement's provisions) upon request, from developed countries party to the agreement.

Current law[24]

Section 402 of the Tariff Act of 1930[25] as amended by the Trade Agreements Act of 1979 establishes "Transaction Value" as the primary basis for determining the value of imported merchandise. Generally, Transaction Value is the price actually paid or payable for the goods, with additions for certain items not included in that price.

If the first valuation basis cannot be used, the secondary bases are considered. These secondary bases, listed in the order of precedence for use, are: Transaction Value of Identical or Similar Merchandise; Deductive Value; Computed Value.

The order of precedence of the last two bases can be reversed if the importer so requests. Each of these bases is discussed in detail below:

Transaction Value of Imported Merchandise.—Several concepts relating to the transaction value of imported merchandise are also applicable to the transaction value of identical merchandise, and of similar merchandise which are discussed in the next section. These concepts, concerning the nature of transaction value itself, are discussed in terms of the transaction value of imported merchandise. The discussion in the next section of the transaction value of identical merchandise and similar merchandise will focus on the unique features applicable to those standards.

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[24] Most of the description of current law was taken from "Customs Valuation Under the Trade Agreements Act of 1979," Department of the Treasury, U.S. Customs Service, Office of Commercial Operations, October 1981.

[25] 19 U.S.C. 1401a.

DEFINITIONS

The transaction value of imported merchandise (i.e., the merchandise undergoing appraisement) is defined as the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to:

A. The packing costs incurred by the buyer;

B. Any selling commission incurred by the buyers;

C. The value of any assist;[26]

D. Any royalty or license fee that the buyer is required to pay as a condition of the sale;

E. The proceeds, accruing to the seller, of any subsequent resale, disposal, or use of the imported merchandise.

These amounts (A through E) are added only to the extent that each (1) is not included in the price, and (2) is based on information establishing the accuracy of the amount. If sufficient information is not available, then the transaction value cannot be determined; and the next basis of value, in order of precedence, must be considered for appraisement.

The price actually paid (or payable) for the imported merchandise is the total payment, excluding international freight, insurance, and other C.I.F. charges, that the buyer makes to the seller.

Amounts to be disregarded in determining transaction value are:

A. The cost, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the goods from the country of exportation to the place of importation in the United States.

B. Any decrease in the price actually paid or payable that is made or effected between the buyer and seller after the *date of importation* of the goods into the United States.

As well as, *if identified separately:*

C. Any reasonable cost or charge incurred for: (1) Constructing, erecting, assembling, maintaining, or providing technical assistance with respect to the goods after importation into the United States, or (2) transporting the goods after importation.

D. The customs duties and other Federal taxes, including any Federal excise tax for which sellers in the United States are ordinarily liable.

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[26] An "assist" is any of the following items that the buyer of imported merchandise provides directly or indirectly, and free of charge or at reduced cost, for use in the production of or the sale for export to the United States of the imported merchandise:

Materials, components, parts, and similar items incorporated in the imported merchandise.

Tools, dies, molds, and similar items used in producing the imported merchandise.

Merchandise consumed in producing the imported merchandise.

Engineering, development, artwork, design work, and plans and sketches that are undertaken outside the United States.

The last item listed above ("Engineering, development . . .") will not be treated as an assist if the service or work is (1) performed by a person domiciled within the United States, (2) performed while that person is acting as an employee or agent of the buyer of the imported merchandise, and (3) incidental to other engineering, development, artwork, design work, or plans or sketches undertaken within the United States.

LIMITATIONS ON THE APPLICABILITY OF TRANSACTION VALUE

The transaction value of imported merchandise is the appraised value of that merchandise, provided certain limitations do not exist. If any of these limitations are present, then transaction value cannot be used as the appraised value, and the next basis of value will be considered.

The limitations can be divided into four groups: restrictions on the disposition or use of the merchandise, conditions for which a value cannot be determined, proceeds accruing to the seller, and related-party transactions where the transactions value is not acceptable. Each is discussed separately below.

1. Restrictions.—With regard to the first category of limitations which preclude the use of transactions value, is the imposition of restrictions by a seller on a buyer's disposition or use of the imported merchandise. However, exceptions are made to this rule. Thus certain restrictions are acceptable, and their presence will still allow the use of transaction value.

The acceptable restrictions are: (a) those imposed or required by law, (b) those limiting the geographical area in which the goods may be resold, and (c) those not substantially affecting the value of the goods. An example of the last restriction occurs when a seller stipulates that a buyer of new-model cars cannot sell or exhibit the cars until the start of the new sales year.

2. Conditions.—Secondly, if the sale of, or the price actually paid or payable for, the imported merchandise is subject to any condition or consideration for which a value cannot be determined, then transaction value cannot be used. Some examples of this group include when the price of the imported merchandise depends on (a) the buyer's also buying from the seller other merchandise in specified quantities, (b) the price at which the buyer sells other goods to the seller, or (c) a form of payment extraneous to the imported merchandise, such as, the seller's receiving a specified quantity of the finished product that results after the buyer further processes the imported goods.

3. Proceeds.—Under the third category of impermissable restrictions, if part of the proceeds of any subsequent resale, disposal, or use of the imported merchandise by the buyer accrues directly or indirectly to the seller, then transaction value cannot be used. There is an exception however.

The exception is that, if an appropriate adjustment can be made for the partial proceeds the seller receives, then transaction value can still be considered. Whether an adjustment would be made would depend on whether the price actually paid or payable includes such proceeds and, if it does not, the availability of sufficient information to determine the amount of such proceeds.

4. Relationship.—Finally, the relationship between the buyer and seller may preclude the application of transaction value. The fact that the buyer and seller are related[27] does not automatically

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[27] For appraisement purposes, any of the following persons are considered related—

Members of the same family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants;

Any officer or director of an organization and such organization;

Continued

negate using their transaction value; however, the transaction value must be acceptable under prescribed procedures.

To be acceptable for Transaction Value, relationship between the buyer and seller must not have influenced the price actually paid or payable.

Alternatively, the transaction value may be acceptable if the imported merchandise closely approximates any one of the following test values, provided these values relate to merchandise exported to the United States at or about the same time as the imported merchandise:

(a) The transaction value of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States,

(b) The deductive value or computed value for identical merchandise or similar merchandise, or

(c) The transaction value of imported merchandise in sales to unrelated buyers of merchandise, for exportation to the United States, that is identical to the imported merchandise under apprisement, except for having been produced in a different country. No two sales to unrelated buyers can be used for comparison unless the sellers are unrelated.

The test values are used for comparison only. They do not form a substitute basis of valuation.

In determining if the transaction value is close to one of the foregoing test values (a, b, or c), an adjustment is made if the sales involved differ in:

> Commercial levels; quantity levels; the costs, commissions, values, fees, and proceeds described in A through E of the "Definition" of value; and the costs incurred by the seller in sales in which he and the buyer are not related that are not incurred by the seller in sales in which he and the buyer are related.

As stated, the test values are alternatives to the relationship criterion. If one of the test values is met, it is not necessary to examine the question of whether the relationship influenced the price.

Transaction value of identical merchandise or similar merchandise.—If the transaction value of imported merchandise cannot be determined, then the customs value of the imported goods being appraised is the transaction value of identical merchandise. If merchandise identical to the imported goods cannot be found or an acceptable transaction value for such merchandise does not exist, then the customs value is the transaction value of similar merchandise.

The same additions, exclusions, and limitations, previously discussed in determining the transaction of imported merchandise, also apply in determining the transaction value of identical or

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An officer or director of an organization and an officer or director of another organization, if each such individual is also an officer or director in the other organization;

Partners;

Employer and employee;

Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization;

Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

similar merchandise. Therefore that discussion will not be repeated in this section.

Besides the data common to all three transaction values, certain factors specifically apply to the transaction value of identical merchandise or similar merchandise. These factors concern (a) the exportation date, (b) the level and quantity of sales, (c) the meaning, and (d) the order of precedence of identical merchandise and of similar merchandise.

a. Exportation Date.—The identical merchandise, or similar merchandise, for which a transaction value is being determined must have been sold for export to the United States and exported at or about the same time as the merchandise being appraised.

b. Sales Level/Quantity.—The transaction value of identical merchandise (or similar merchandise) must be based on sales of identical merchandise (or similar merchandise) at the same commercial level and, in substantially the same quantity, as the sales of the merchandise being appraised. If no such sale exists, then sales at either a different commercial level or in different quantities, or both, can be used, but must be adjusted to take account of any such difference. Any adjustment must be based on sufficient information, that is, information establishing the reasonableness and accuracy of the adjustment.

c. Definition.—(1) The term *"identical merchandise"* means merchandise that is:

Identical in all respects to the merchandise being appraised;

Produced in the same country as the merchandise being appraised; and

Produced by the same person as the merchandise being appraised.

If merchandise meeting all three criteria cannot be found, then identical merchandise is merchandise satisfying the first two criteria but produced by a different person than the merchandise being appraised. Merchandise can be identical to the merchandise being appraised and still show minor differences in appearance. However, identical merchandise does not include merchandise that incorporates or reflects engineering, development, artwork, design work, and plans and sketches provided free or at reduced cost by the buyer and undertaken in the United States.

(2) The term *"similar merchandise"* means merchandise that is—

Produced in the same country and by the same person as the merchandise being appraised,

Like the merchandise being appraised in characteristics and component materials, and

Commercially interchangeable with the merchandise being appraised.

If merchandise meeting the foregoing criteria cannot be found, then similar merchandise is merchandise having the same country of production, like characteristics and component materials, and commercial interchangeability but produced by a different person.

In determining whether goods are similar, some of the factors to be considered are the quality of the goods, their reputation, and the existence of a trademark. It is noted, however, that similar merchandise does not include merchandise that incorporates or reflects engineering, development, artwork, design work, and plans and sketches provided free or at reduced cost by the buyer and undertaken in the United States.

d. Order of Precedence.—Sometimes more than one transaction value will be present, that is, for identical merchandise produced by the same person, for identical merchandise produced by another person, for similar merchandise produced by the same person, and for similar merchandise produced by another person. If this occurs, one value must take precedence.

As stated previously, accepted sales at the same level and quantity take-precedence over sales at different levels and/or quantities. The order of precedence can be summarized as:

(1) Identical merchandise produced by the same person;
(2) Identical merchandise produced by another person;
(3) Similar merchandise produced by the same person; and
(4) Similar merchandise produced by another person.

It is possible that two or more transaction values for identical merchandise (or similar merchandise) will be determined. In such a case, the lowest value will be used as the appraised value of the imported merchandise.

Deductive value.—If the transaction value of imported merchandise, of identical merchandise, or of similar merchandise cannot be determined, then deductive value is calculated for the merchandise being appraised. Deductive value is the next basis of appraisement to be used, unless the importer designated, at entry summary, computed value as the preferred method of appraisement. If computed value was chosen and subsequently determined not to exist for customs valuation purposes, then the basis of appraisement reverts back to deductive value.

If an assist is involved in a sale, that sale cannot be used in determining deductive value. So any sale to a person who supplies an assist for use in connection with the production or sale for export of the merchandise concerned is disregarded for deductive value.

Basically deductive value is the resale price in the United States after importation of the goods, with deductions for certain items Generally, the deductive value is calculated by starting with a unit price and making certain additions to and deductions from that price.

One of three prices constitutes the unit price in deductive value. The price used depends on when and in what condition the merchandise concerned is sold in the United States. If the merchandise is sold in the condition as imported at or about the date of importation of the merchandise being appraised, the price used is the unit price at which the greatest aggregate quantity of the merchandise concerned is sold at or about such date.

If the merchandise concerned is sold in the condition as imported but not sold at or about the date of importation of the merchandise being appraised, the price used is the unit price at which the greatest aggregate quantity of the merchandise concerned is sold after the date of importation of the merchandise being appraised but before the close of the 90th day after the date of such importation.

Finally, if the merchandise concerned is not sold in the condition as imported and not sold before the close of the 90th day after the date of importation of the merchandise being appraised. Price: The price used is the unit price at which the greatest aggregate quantity of the merchandise being appraised, after further processing, is sold before the 180th day after the date of such importation.

After determining the appropriate price, packing costs for the merchandise concerned must be added to the price used for deductive value, provided such costs have not otherwise been included. These costs are added, regardless or whether the importer or the buyer incurs the cost. Packing costs include the cost (a) of all containers and coverings of whatever nature and (2) of packing, whether for labor or materials, used in placing the merchandise in condition, packed ready for shipment to the United States.

Certain other items are not a part of deductive value and must be deducted from the unit price. The items are:

(1) *Commissions or Profit and General Expenses.*—Any commission usually paid or agreed to be paid, or the addition usually made for profit and general expenses, applicable to sales in the United States of imported merchandise that is (a) of the same class or kind as the merchandise concerned; and (b) regardless of the country of exportation.

(2) *Transportation/Insurance Costs.*—The usual and associated costs of transporting and insuring the merchandise concerned (a) from the country of exportation to the place of importation in the United States; and (b) from the place of importation to the place of delivery in the United States, provided these costs are not included as a general expense under the preceding paragraph.

(3) *Customs Duties/Federal Taxes.*—The customs duties and other Federal taxes payable on the merchandise concerned because of its importation, plus any Federal excise tax on, or measured by the value of, such merchandise for which sellers in the United States are ordinarily liable; and

(4) *Value of Further Processing.*—The value added by the processing of the merchandise after importation, provided sufficient information exists concerning the cost of processing. The price determined for deductive value is reduced by the value of further processing, only if the third unit price is used as deductive value (i.e., the merchandise concerned is not sold in the condition as imported and not sold before the close of the 90th day after the date of importation, but is sold before the 180th day after the date of importation).

Computed value.—The last basis of appraisement is computed value. If customs valuation cannot be based on any of the values previously discussed, then computed value is considered. This value is also the one the importer can select at entry summary to precede deductive value as a basis of appraisement.

Computed value consists of the sum of the following items:

(a) Materials, fabrication, and other processing used in producing the imported merchandise;

(b) Profit and general expenses;

(c) Any assist, if not included in (a) and (b); and

(d) Packing costs.

The cost or value of the materials, fabrication, and other processing of any kind used in producing the imported merchandise is based (1) on information provided by or on behalf of the producer and (2) on the commercial accounts of the producer, if the accounts are consistent with generally accepted accounting principles applied in the country of production of the goods.

The producer's profit and general expenses are used, provided they are consistent with the usual profit and general expenses reflected by producers in the country of exportation in sales of merchandise of the same class or kind as the imported merchandise.

If the value of an assist used in producing the merchandise is not included as part of the producer's materials, fabrication, other processing or general expenses, then the prorated value of the assist will be included in computed value. The value of any engineering, development, artwork, design work, and plans and sketches undertaken in the United States is included in computed value only to the extent that such value has been charged to the producer.

Finally, the cost of all containers and coverings of whatever nature and of packing, whether for labor or material, used in placing merchandise in condition, packed ready for shipment to the United States is included in computed value.

As can be seen, computed value relies to a certain extent on information that has to be obtained outside the United States, that is, from the producer of the merchandise. If a foreign producer refuses to or is legally constrained from providing the computed value information, or if the importer cannot provide such information within a reasonable period of time, then computed value cannot be determined.

Other.—If none of the previous five values can be used to appraise the imported merchandise, then the customs value must be based on a value derived from one of the five previous methods, reasonably adjusted as necessary. The value so determined should be based, to the greatest extent possible, on previously determined values. Only data available in the United States will be used.

Some examples of how the other methods can be reasonably adjusted are:

Identical Merchandise (or Similar Merchandise):

(a) The requirement that the identical merchandise (or similar merchandise) should be exported at or about the same time as the merchandise being appraised could be flexibily interpreted.

(b) Identical imported merchandise (or similar imported merchandise) produced in a country other than the country of exportation of the merchandise being appraised could be the basis for customs valuation.

(c) Customs values of identical imported merchandise (or similar imported merchandise) already determined on the basis of deductive value and computed value could be used.

Deductive method.—The 90-day requirement could be administered flexibly.

Other Customs Laws

Country-of-origin marking

Section 304 of the Tariff Act of 1930, as amended,[28] provides that, with certain exceptions, every imported article of foreign origin (or its container in specified circumstances) "shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." The purpose of this provision is to permit the "ultimate purchaser" in the United States to choose between domestic and foreign-made products, or between the products of different foreign countries.

When imported articles ordinarily reach their ultimate purchasers in packaged form, the containers or holders must, as a general rule, be marked with the country of origin of their contents, whether or not the articles themselves are required to be marked.

Exceptions.—The statute gives the Secretary of the Treasury the authority to allow exceptions to the marking requirement under prescribed circumstances. For example, certain classes of merchandise are excepted from the country of origin marking requirements because they are not physically susceptible to marking or can only be marked at the cost of injury to the article.

Marking requirements may also be waived as to articles which arrive at the United States border unmarked, if the expense of marking under Customs supervision would be economically prohibitive and the Customs Service is satisfied that the importer or shipper did not fail to mark the merchandise before shipment to the United States for the purpose of invoking this exception and thereby avoiding the marking requirements.

Another exception to the marking requirement may be granted for articles as to which the ultimate purchaser necessarily knows the country of origin. An exception is also provided for articles to be processed by the importer for resale if the processing would necessarily obliterate or conceal any marking. If the processing undertaken by the importer is sufficient to convert the imported article into a new and different article of trade, any subsequent purchaser is not an ultimate purchaser of the imported article.

Other classes of excepted merchandise include products of American fisheries, products of U.S. possessions, products of U.S. origin which have been exported and returned, and articles entered for immediate transshipment and exportation from the United States. In addition, articles qualifying for duty-free treatment as being $1 or less in value, or as bona fide gifts less than $10 in value each, are relieved of the marking requirements, as are articles produced more than 20 years prior to importation.

Finally, under 19 U.S.C. 1304(a)(3)(J), classes of articles named in certain notices published by the Secretary of the Treasury in the late 1930's are not subject to the marking requirements. The articles named in such notices were those which had been imported in substantial quantities during the 5-year period ending December

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[28] 19 U.S.C. 1304.

31, 1936, and which had not been required to bear country of origin markings during that period. Such excepted articles are now found in the so-called "J-List." [29]

A recent amendment to section 304 of the Tariff Act of 1930 contained in section 207 of the Trade and Tariff Act of 1984 provides that no exceptions may be made to the country of origin marking requirement for imported pipe, pipe fittings, compressed gas cylinders, manhole rings or frames, covers and assemblies thereof and specifies the type of marking which is acceptable for those products.

Penalty for failure to mark—Imported goods that are not properly marked are liable for a 10 percent ad valorem duty in addition to any other duty that might be applicable.

However, the payment of the 10 percent marking duty does not discharge the importer's obligation to comply.[30]

Imported articles or their containers that are found to be improperly marked are generally retained in Customs custody until such time as the importer, after notification, arranges for their exportation, destruction, or proper marking under Customs supervision, or until they are deemed abandoned to the Government. If such unmarked articles are part of a shipment the balance of which has previously been released from Customs custody, the importer will be notified and ordered to redeliver the released articles to Customs for marking, exportation, or destruction under Customs supervision.

Drawback

Under 19 U.S.C. 1313(a) "drawback" is payable upon the exportation of an article manufactured or produced in the United States with the use of duty-paid imported merchandise. To receive benefit of drawback, the completed article must have been exported within 5 years from the date of importation of the pertinent duty-paid merchandise. The amount of refund is equal to 99 percent of the duties attributable to the foreign, duty-paid content of the exported article.

The purpose of 19 U.S.C. 1313(a) is to permit American-made products to compete more effectively in world markets. It enables domestic manufacturers and producers to select the most advantageous sources for their raw materials and component requirements without regard to duties, thereby permitting savings in their production costs. It also encourages domestic production and, as a result, the utilization of American labor and capital.

The procedural and other requirements governing drawbacks are set forth in 19 CFR Part 22.

An important feature of 19 U.S.C. 1313(a) and a number of other drawback provisions is the allowance of drawback on a substitution basis. Pursuant to 19 U.S.C. 1313(b), an exported article incorporating components entirely of domestic origin can nevertheless qualify for drawback, to the extent that duty has been paid on the importation of components of the same kind and quality as those used in the manufacture or production of the exported article.

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[29] 19 CFR 134.33.

[30] *Globemaster, Inc.* v. *United States*, 68 Cust. Ct. C.D. 4340, 340 F. Supp. 974 (1972).

Section 202 of the Trade and Tariff Act of 1984 expanded the application of current drawback provisions in three important respects. First, it allows drawback if the same person requesting drawback, subsequent to importation and within 3 years of importation of the merchandise, exports from the United States or destroys under Customs supervision fungible merchandise (whether imported or domestic) which is commercially identical to the merchandise imported.

Second, it allows drawback for all packaging materials imported for packaging or repackaging imported merchandise.

Finally, the act provides that any domestic merchandise acquired in exchange for imported merchandise of the same kind and quality shall be treated as the use of such imported merchandise for drawback purposes if no certificate of delivery is issued for such imported merchandise.

In addition to 19 U.S.C. 1313(a), there are a variety of other specific drawback provisions allowing for the refund of duties and/or internal revenue taxes under specified circumstances for the exportation of products such as flavoring extracts, toiletries, distilled spirits, salts, and cured meats. Further, under 19 U.S.C. 1313(c) drawback is allowable when merchandise is rejected by the importer because it fails to conform to the sample upon which the purchase order was made, or because it fails to conform to the importer's specifications, or because the merchandise was shipped without the consignee's consent. When such rejected merchandise is exported under Customs supervision, 99 percent of the duties paid will be refunded upon compliance with the pertinent regulations.

Copyrights and trademark enforcement

Copyrights.—Section 602(a) of the Copyright Revision Act of 1976[31] provides that the importation into the United States of copies of a work acquired outside the United States without authorization of the copyright owner is an infringement of the copyright and are subject to seizure and forfeiture. Forfeited articles are generally destroyed; however, the articles may be returned to the country of export whenever Customs is satisfied that there was no intentional violation. Copyright owners seeking import protection from the U.S. Customs Service must register their claim to copyright with the U.S. Copyright Office and record their registration with Customs in accordance with applicable regulations.[32]

The U.S. Customs Service also enforces the "manufacturing clause" of the Copyright Revision Act of 1976.[33] In general, the "manufacturing clause" prohibits the importation of works authored by a U.S. national or domiciliary consisting preponderantly of nondramatic literary material that is in the English language and protected by copyright, unless the portions consisting of such material have been manufactured in the United States or Canada. The manufacturing requirements do not extend to dramatic, musical, pictorial or graphic works; foreign language works; bilingual or multilingual dictionaries; or public domain material. The manufacturing restrictions will terminate on July 1, 1986, unless extended by Congress.

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[31] Public Law 94-553, sec. 101, approved October 19, 1976, 17 U.S.C. 602(a).

[32] 19 CFR Part 133, Subpart D.

[33] 17 U.S.C. 601

Trademarks and Trade Names.—Articles bearing counterfeit trademarks, or marks which copy or simulate a registered trademark registration of a United States or foreign corporation are prohibited importation, provided a copy of the U.S. trademark registration is filed with the Commissioner of Customs and recorded in the manner provided by regulations.[34] The U.S. Customs Service also affords similar protection against unauthorized shipments bearing trade names which are recorded with Customs pursuant to regulations.[35] It is also unlawful to import articles bearing genuine trademarks owned by a U.S. citizen or corporation without permission of the U.S. trademark owner, if the foreign and domestic trademark owners are not parent and subsidiary companies or otherwise under common ownership and control, provided the trademark has been recorded with Customs and the U.S. trademark owner has not authorized the distribution of trademarked articles abroad.

The Customs Reform and Simplification Act of 1978 [36] strengthened the protection afforded trademark owners against the importation of articles bearing a counterfeit mark. A "counterfeit trademark" is defined as a spurious trademark which is identical with, or substantially indistinguishable from, a registered trademark. Articles bearing a counterfeit trademark which are seized by Customs and forfeited to the government may be (1) given to any Federal, state, or local government agency which has established a need for the article; (2) given to a charitable institution; or (3) sold at public auction if more than 1 year has passed since forfeiture and no eligible organization has established a need for the article. The law also provides an exemption from trademark restrictions for certain articles accompanying a person arriving in the United States when the articles are for personal use and not for sale.

Penalties

Section 592 of the Tariff Act of 1930, as amended,[37] is the basic and most widely used Customs penalty provision. It prescribes monetary penalties against any person who imports, attempts to import, or aids or procures the importation of merchandise by means of false or fraudulent documents, statements, omissions or practices, concerning any material fact. The statute may be applied even though there is no loss of revenue involved.

Section 592 infractions are divided into three categories of culpability, each giving rise to a different maximum penalty, as follows:

(1) *Fraud.*—This category involves an act of commission or omission intentionally done for the purpose of defrauding the United States of revenue, or otherwise violating section 592. The maximum civil penalty for a fraudulent violation is the domestic value of the merchandise in the entry or entries concerned.

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[34] 19 CFR 133.1-133.7.

[35] 19 CFR Part 133, Subpart B.

[36] Public Law 95-410, approved October 3, 1978, 92 Stat. 888.

[37] 19 U.S.C. 1592.

(2) *Gross Negligence.*—This category involves an act of commission or omission with actual knowledge of, or wanton disregard for, the relevant facts and a disregard of section 592 obligations, whereby the United States is or may be deprived of revenue, or where section 592 is otherwise violated. The maximum civil penalty for gross negligence is the lesser of the domestic value of the merchandise or four times the loss of revenue (actual or potential). If the infraction does not affect the revenue, the maximum penalty is 40 percent of the dutiable value of the goods.

(3) *Negligence.*—This category involves a failure to exercise due care in ascertaining the material facts or in ascertaining the obligations under section 592. The maximum civil penalty for negligence is the lesser of the domestic value of the merchandise or twice the loss of revenue (actual or potential). However, where there is no loss-of-revenue issue, the penalty cannot exceed 20 percent of the dutiable value.

In addition to the civil penalties described above, a criminal fraud statute provides for sanctions to those presenting false information to customs officers. Title 18, United States Code, section 542, provides a maximum of 2 years imprisonment, or a $5,000 fine, or both, for each violation involving an importation or attempted importation.

Foreign Trade Zones

The Foreign Trade Zones Act of 1934,[38] as amended, authorizes the establishment of foreign trade zones. A foreign trade zone (FTZ) is a special enclosed area within or adjacent to ports of entry, usually located at industrial parks or in terminal warehouse facilities. Although operated under the supervision and enforcement of the Customs Service, they are considered outside the Customs territory of the United States for purposes of Customs entry procedures. With certain exceptions, any foreign or domestic merchandise may be brought into a foreign trade zone for storage, sale, exhibition, breaking up, repacking, distribution, mixing with foreign or domestic merchandise, assembly, manufacturing, or other processing. Foreign merchandise imported into an FTZ is not subject to duty, formal entry procedures or quotas unless and until it is subsequently imported into U.S. Customs territory.

The framework that governs the establishment and operation of FTZs has three principal components. First, the Foreign-Trade Zones Act of 1934 (the Act) authorizes the establishment of FTZs and, as amended in 1950, allows manufacturing in FTZs.[39] Second, regulations, promulgated by both the Customs Service[40] and the Department of Commerce,[41] expand on the Act. A 1952 amendment to the regulations provided for the establishment of "subzones" in addition to general purpose zones. Third, the decision in *Armco Steel Corp.* v. *Stans* in 1970 validated the use of zone manufacturing to avoid customs duties and interpreted several key provisions of the Act.[42]

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[38] Act of June 18, 1934, ch. 590, 48 Stat. 998, 19 U.S.C. 81a–81u.

[39] Boggs amendment of 1959, ch. 296, 64 Stat. 246, 19 U.S.C. 81c.

[40] 19 CFR 146.0–48 (1980).

[41] 15 CFR 400.100–1406 (1980).

Although legislation providing for foreign trade zones had been introduced as early as 1894, the first such statute was not enacted until 1934. Hearings on foreign-trade zone bills were held in 1934 by both the House and Senate.[43] The Committee on Ways and Means reported a bill with amendments [44] which passed the House May 9, 1934. The Senate debated, amended, and passed legislation inserting the text of its own bill. Following a conference, the Foreign Trade Zone Act was approved June 18, 1934.

The original purpose of the Act was to expedite and encourage foreign commerce. Initially, FTZs were little more than transshipment or consignment centers for the storage, repackaging, or light processing of foreign goods pending re-exportation. The 1934 Act prohibited the manufacture and exhibition of goods in FTZs. In 1950, however, Congress removed this prohibition by passing the so-called Boggs amendment (named after Mr. Boggs of Louisiana). The amendment added manufacturing to the list of activities permitted and authorized exhibition in zones.

The amendment to the FTZ regulations in 1952 that provided for the establishment of subzones is important to manufacturing and assembly operations in zones. The essential distinction between the two types of zones is that individual subzones, are generally used by only one firm, whereas there is no limitation on the number of firms that can operate in a general-purpose zone. Subzones were established to assist companies which were unable to relocate to or take advantage of an existing general-purpose zone.[45] Under the regulations, only a grantee of a previously approved general zone may apply to establish a subzone.

Authority for establishing these facilities is granted to qualified corporations, or political subdivisions, who must submit applications to the Department of Commerce's Foreign Trade Zones Board, comprised of the Secretary of Commerce (Chair), the Secretary of Treasury, and the Secretary of Army.[46] The Board's regulations set forth the basic requirements for applying and qualifying for a FTZ. The statute provides that every officially designated port of entry is entitled to at least one FTZ. Public hearings are often held by the Board staff in the locale involved. While most applications are noncontroversial, occasionally domestic industries or labor that are sensitive to imports will oppose a subzone application.

Section 3, which contains the basic substantive provisions of the Act, allows merchandise to be imported into FTZ's without being subject to U.S. Customs laws. The section regulates the tariff treatment of FTZ merchandise according to its status as foreign or domestic, and as privileged or nonprivileged.

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[42] 431 F.2d 779 (2d Cir. 1970), aff'g 303 F. Supp. 262 (S.D.N.Y. 1969).

[43] Foreign-Trade Zones: Hearings on H.R. 3657 Before a Subcomm. of the House Comm. on Ways and Means, 73d Cong. 2d Sess. (1934); Foreign-Trade Zones: Hearings on S. 1319 and S. 2001 Before a Subcomm. of the Senate Comm. on Commerce, 73d Cong., 2d Sess. (1934).

[44] House Report 1521.

[45] 15 CFR 400.304 (1983).

[46] 19 U.S.C. § 81a(b) (1976). The jurisdiction and authority of the Board are set forth in 15 CFR 400.200–203 (1980).

One may apply for privileged status for foreign merchandise in an FTZ that has not yet been manipulated or manufactured so as to effect a change in its tariff classification. Foreign merchandise that is not privileged, recovered waste and merchandise that was originally domestic but can no longer be identified as such are deemed to be nonprivileged foreign merchandise. Domestic merchandise that would otherwise have been eligible for privileged status but for which no application was made is nonprivileged merchandise.

The status of the merchandise becomes significant when it enters U.S. customs territory. Customs appraises and classifies privileged foreign merchandise to determine the taxes and duties owed according to the condition of the merchandise when it enters a FTZ. The importer pays the previously determined taxes and duties when bringing the merchandise into U.S. customs territory regardless of any manufacturing or manipulation of the goods with other foreign or domestic privileged merchandise.

In contrast, merchandise that is composed entirely of or derived entirely from nonprivileged merchandise, either foreign or domestic, or of a combination of privileged and nonprivileged merchandise, is appraised and classified according to its condition when constructively transferred into U.S. customs territory. Thus, the duty and taxes payable on nonprivileged or combined merchandise are those applicable to its classification and value when it enters U.S. customs territory and not when it enters the zone. This distinction is an important potential advantage of zone-based operations.

According to the General Accounting Office (GAO) the number of zones and the dollar value of their business activities have increased dramatically in recent years. FTZ's grew from only 13 general purpose zones and 5 subzones in 1973 to 87 general purpose zones and 30 subzones by 1983.[47] GAO attributed the increase in part to a 1980 Treasury ruling holding that the dutiable value of finished products processed in the zone would be only the value attributable to the foreign components used and not the value added.

Finally, because section 3 of the Act allows an importer to elect to pay duty either on components and raw materials or on the completed article, the importer may reduce his tariff liability by manufacturing or assembling higher duty components into a lower duty product. This so-called inverted tariff, which is commonly characteristic of high technology merchandise, is also responsible for the recent growth in zone-based manufacturing and assembly of high value products, such as machinery, transportation equipment, electronics and chemicals.

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[47] Report to the Chairman, Committee on Ways and Means by the U.S. General Accounting Office, GAO/GGO-84-52, P.11, March 2, 1984.

Chapter 2: TRADE REMEDY LAWS

Unfair Trade Laws

ANTIDUMPING (AD) LAW

Title VII of the Tariff Act of 1930, as amended,[1] provides for the imposition of additional duties when foreign merchandise is being dumped in the U.S. market and is injuring the U.S. industry. Dumping generally refers to a form of international price discrimination, whereby goods are sold in an export market (such as the United States) at prices which are lower than the prices at which comparable goods are sold in the home market of the exporter or in other export markets. Antidumping law refers to such sales as sales at "less than fair value" (LTFV). Antidumping duties equal to the margin of dumping are imposed on all imports which cause material injury by reason of sales at less than fair value.

BACKGROUND

In 1916 the Congress passed the Antidumping Act of 1916, providing a civil cause of action in Federal court for private damages against parties who dumped foreign merchandise in the United States.[2] The requirements under this statute, however, particularly the need to show evidence of intent, are difficult to prove, and the need for a different type of antidumping law was considered by Congress. In 1921 the Antidumping Act of 1921 was passed, which provided the statutory basis, until 1979, for an administrative investigation by the Department of the Treasury of alleged dumping practices and for imposition of antidumping duties.[3]

During the post-World War II negotiations to establish an International Trade Organization, the United States proposed a draft article on dumping, based on the Antidumping Act of 1921. This draft became the basis for Article VI of the General Agreement on Tariffs and Trade (GATT), which is the international framework governing national antidumping laws.

During the 1960's, antidumping actions and their potential for abuse, rather than the dumping practice itself, became a source of great concern to many nations. As a result, during the Kennedy Round of Multilateral Trade Negotiations, the GATT Antidumping Code of 1967 was established. The GATT Code had three main functions: (1) to clarify and elaborate on the broad concepts of Article VI of the GATT; (2) to supplement Article VI by establishing appropriate procedural requirements for antidumping investigations; and (3) to bring all GATT signatory countries into conformity with Article VI. The GATT Antidumping Code came into force on July 1, 1968, and provided for the establishment for a GATT Committee on Antidumping Practices, whose function was to review annually the operation of national antidumping laws.

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[1] Public Law 71-361, title VII, as added by Public Law 96-39, title I, section 101, approved July 26, 1979, 19 U.S.C. 1673.

[2] Act of September 8, 1916, ch. 463, sec. 801, 39 Stat. 798, 15 U.S.C. 72.

[3] Act of May 27, 1921, ch. 14, 42 Stat. 11, 19 U.S.C. 160 (now repealed).

During the Tokyo Round of Multilateral Trade Negotiations in the 1970's, the GATT Antidumping Code was amended to conform to the newly negotiated Agreement Relating to Subsidies and Contervailing Measures, also negotiated at that time and involving changes in Article VI of the GATT. The GATT Agreement on Implementation of Article VI of the GATT, Relating to Antidumping Measures came into force on January 1, 1980.[4]

The Congress approved the revised GATT Antidumping Code under section 2a of the Trade Agreements Act of 1979.[5] Title I of the 1979 Act repealed the Antidumping Act of 1921 and added a new title VII to the Tariff Act of 1930 implementing the provisions of the agreement in a new antidumping law. In addition to the substantive and procedural changes made by the 1979 Act, the responsibility for administering the antidumping law was transferred from the Department of the Treasury to the Department of Commerce in 1979.[6] The antidumping law was further amended by title VI of the Trade and Tariff Act of 1984, which was passed on October 30, 1984.[7]

BASIC PROVISIONS

Section 731 of the Tariff Act of 1930, as amended,[8] provides that an antidumping duty shall be imposed, in addition to any other duty, if two conditions are met. First, the Department of Commerce (DOC) must determine that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." Second, the International Trade Commission (ITC) must determine that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise." If the DOC determines that LTFV sales exist and the ITC determines that material injury exists, an antidumping duty order is issued imposing antidumping duties equal to the amount by which foreign market value exceeds the United States price for the merchandise (the dumping margin).

Basis of comparison: Foreign market value

The determination of whether LTFV sales exist, and what the margin of dumping is, is based on a comparison of foreign market value with the United States price of each import sale made during the relevant time period under investigation. Foreign market value is determined by one of three methods, in order of preference: home market sales, third-country sales, or constructed value. If such or similar merchandise is sold in the market of the exporting country for home consumption, then foreign market value is to be based on such sales. If home market sales do not exist, or are so few as to form an inadequate basis for comparison, then the price at which such or similar merchandise is sold for exportation to countries other than the United States becomes the basis for foreign market value. If neither home market sales nor third-country sales form an adequate basis for comparison, then foreign market value is the constructed value of the imported merchandise. Constructed value is determined by a formula set forth in the statute, which is the sum of costs of production, plus at least 10 percent for general expenses, plus at least 8 percent for profit.

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[4] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, MTN/NTM/W/232, reprinted in House Doc. No. 96-153, pt. I at 311.

[5] Public Law 96-39, approved July 26, 1979.

[6] Reorganization Plan No. 3, Exec. Order No. 12188, January 4, 1980, 44 Fed. Reg. 69273.

[7] Public Law 98-573, approved October 30, 1984.

[8] 19 U.S.C. 1673.

Foreign market value based on home market or third-country sales is a single price, in U.S. dollars, which represents the weighted average of prices in the home market or third-country market during the period under investigation. Sales made at less than cost of production are disregarded in the determination of foreign market value. Adjustments are made for differences in merchandise, quantities sold, and circumstances of sale to provide [9] for comparability of foreign market value with United States price. Averaging or sampling techniques may be used in the determination of foreign market value whenever a significant volume of sales is involved or a significant number of price adjustments is required.

If the economy of the exporting country is state-controlled to an extent that home market sales or third-country sales of such or similar merchandise do not permit a determination of foreign market value, then foreign market value is based on surrogate country prices. Under this approach, foreign market value is based on normal costs, expenses, and profit as reflected by either (1) prices at which such or similar merchandise of a non-state-controlled-economy country is sold for consumption in its home market or to other countries, including the United States, or (2) the constructed value in a non-state-controlled-economy country.

United States price

The margin of dumping, and the amount of antidumping duty to be imposed, is determined by comparing the foreign market value with the United States price of each entry into the United States of foreign merchandise subject to the investigation. United States price is equal to the purchase price or the exporter's sales price of the merchandise, whichever is appropriate. "Purchase price" is the price at which merchandise is purchased or agreed to be purchased prior to date of importation to the United States. It may be used if transactions between related parties indicate the merchandise has been sold prior to importation to a U.S. buyer unrelated to the producer. "Exporter's sales price" is the price at which merchandise is sold or agreed to be sold in the United States before or after importation, by or for the account of the exporter.

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[9] Section 624 of the Trade and Tariff Act of 1984 requires the Secretary of Commerce to undertake a study of current practices that are applied in making adjustments to purchase price, exporter's sales price, foreign market value, and constructed value in determining dumping duties. The Secretary must complete the study by October 31, 1985 and submit a written report to the Congress. The report would contain whatever recommendations the Secretary deems appropriate on the need and means for simplifying and modifying current adjustment practices.

Material injury

Prior to issuance of an antidumping duty order, the ITC must determine that the domestic industry is being materially injured, or threatened with material injury, or the establishment of a domestic industry is materially retarded, by reason of imports at less than fair value. The standard of injury under the antidumping law, material injury, is the same standard as that under the countervailing duty law. Section 771(7) of the Tariff Act of 1930 defines "material injury" as harm which is not inconsequential, immaterial, or unimportant.

The ITC determination of injury basically involves a two-prong inquiry: first, with respect to the fact of material injury, and second, with respect to the causation of such material injury. The ITC is required to analyze the volume of imports, the effect of imports on U.S. prices of like merchandise, and the effects that imports have on U.S. producers of like products, taking into account many factors, including lost sales, market share, profits, productivity, return on investment, and utilization of production capacity. Also relevant are the effects on employment, inventories, wages, and the ability to raise capital. The ITC is required to cumulatively assess the volume and effect of like imports from two or more countries subject to investigation if the imports compete with each other and with like products of the domestic industry in the U.S. market.

PROCEDURES FOR ANTIDUMPING INVESTIGATIONS

Initiation of investigation

Antidumping investigations may be self-initiated by the DOC or may be initiated as a result of a petition filed by an interested party. Petitions may be filed by any of the following, on behalf of the affected industry: (1) a manufacturer, producer, or wholesaler in the United States of a like product; (2) a certified or recognized union or group of workers which is representative of the affected industry; (3) a trade or business association with a majority of members producing a like product; (4) a coalition of firms, unions, or trade associations that have individual standing. The DOC is required to provide technical assistance to small businesses to enable them to prepare and file petitions under the antidumping law.

Petitions are to be filed simultaneously with both the DOC and ITC. Within 20 days after the filing of a petition, the DOC must decide whether or not the petition is legally sufficient to commence an investigation. If so, an investigation is initiated with respect to imports of a particular product from a particular country. Section 609 of the Trade and Tariff Act of 1984 establishes a procedure whereby the DOC may monitor imports from additional supplier countries for up to 1 year in order to determine whether persistent dumping exists with respect to that product, and self-initiation of additional dumping cases is warranted.

Preliminary ITC injury determination

Within 45 days of the date of filing of the petition, or of self-initiation, the ITC must determine whether there is a "reasonable indication" of material injury, based on the best information available to it at the time. The petitioner bears the burden of proof with respect to this issue. If the ITC preliminary determination is negative, the investigation is terminated. If it is positive, the investigation proceeds.

Preliminary DOC LTFV determination

Within 160 days after the petition is filed or the investigation is self-initiated, the DOC must determine whether there is a "reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value." The preliminary determination is based on the best information available to DOC at the time. If affirmative, the preliminary determination must include an estimated average amount by which the foreign market value exceeds the United States price.

The effect of an affirmative preliminary determination is twofold: (1) The DOC must order the suspension of liquidation of all entries of foreign merchandise subject to the determination from the date of publication of the preliminary determination. The DOC must also order the posting of a cash deposit, bond, or other appropriate security for each subsequent entry of the merchandise equal to the estimated margin of dumping; (2) The ITC must begin its final injury investigation, and DOC must make all information available to ITC which is relevant to an injury determination. If the preliminary determination is negative, no suspension of liquidation occurs, and the DOC investigation simply continues.

An expedited preliminary determination within 90 days of initiation of the investigation may be made based on information received during the first 60 days if such information is sufficient and the parties provide a written waiver of verification and an agreement to have an expedited preliminary determination. On the other hand, the preliminary determination may be postponed until 210 days after filing of petition or self-initiation, at the petitioner's request or in cases which DOC determines are extraordinarily complicated.

If the petitioner alleges critical circumstances, the DOC must determine, on the basis of best information available at the time, whether (1) there is a history of dumping in the United States or elsewhere of this class or kind of merchandise, or the importer knew the merchandise was being sold at less than fair value; and (2) there have been massive imports of the merchandise over a relatively short period. If DOC determines critical circumstances exist, then any suspension of liquidation ordered shall retroactively apply to unliquidated entries of merchandise entered up to 90 days prior to the date suspension of liquidation was ordered.

Final DOC LTFV determination

Within 75 days after the date of its preliminary determination, DOC must issue a final LTFV determination, unless a timely request for extension is granted, in which case the final determination must be made within 135 days. If the final determination is negative, the investigation is terminated, including any suspension of liquidation which may be in effect, and all estimated antidumping duties are refunded and all appropriate bonds or other security are released. If the final determination is affirmative, the DOC orders the suspension of liquidation and posting of a cash deposit, bond, or other security, if such actions have not already been taken as a result of the preliminary determination, and awaits notice of the ITC final injury determination.

Final ITC injury determination

Within 120 days of a DOC affirmative preliminary determination or 45 days of a DOC affirmative final determination, whichever is longer, the ITC must make a final determination of material injury. If the DOC preliminary determination was negative, and the DOC final determination was affirmative, ITC has until 75 days after the final affirmative determination to make its injury determination.

Termination or suspension of AD investigations

Either the DOC or ITC may terminate an AD investigation upon withdrawal of the petition by petitioner, or by DOC if the investigation was self-initiated. The DOC may not, however, terminate an investigation on the basis of a quantitative restriction agreement limiting U.S. imports of the merchandise subject to investigation unless DOC is satisfied that termination on the basis of such agreement is in the public interest.

The DOC may suspend an AD investigation on the basis of one of three types of agreements entered into with exporters who account for substantially all of the imports under investigation. The three types of agreements are: (1) an agreement to cease exports of the merchandise to the United States within 6 months of suspension of the investigation; (2) an agreement to revise prices to eliminate completely any sales at less than fair value; (3) an agreement to revise prices to eliminate completely the injurious effect of exports of such merchandise to the United States. The DOC may not, however, accept any such agreement unless it is satisfied that suspension of the investigation is in the public interest, and effective monitoring of the agreement is practicable. Unlike countervailing duty cases, antidumping investigations cannot be suspended on the basis of quantitative restriction agreements.

Prior to actual suspension of an investigation, the DOC must provide notice of its intent to suspend and an opportunity for comment by interested parties. When the DOC decides to suspend the investigation, it must publish notice of the suspension, and issue an affirmative preliminary LTFV determination (unless previously issued). The ITC also suspends its investigation. Any suspension of liquidation ordered as a result of the affirmative preliminary LTFV determination, however, is to be terminated and all deposits of estimated antidumping duties or bonds posted are to be refunded or released.

If, within 20 days after notice of suspension is published, the DOC receives a request for continuation of the investigation from a domestic interested party or from exporters accounting for a significant proportion of exports of the merchandise, then both the DOC and ITC must continue their investigations.

The DOC has responsibility for overseeing compliance with any suspension agreement. Intentional violations of suspension agreements are subject to civil penalties.

ASSESSMENT OF ANTIDUMPING DUTIES

Both the DOC and ITC must issue affirmative final determinations in order for an AD duty order to be issued. Within 7 days of notice of an affirmative final ITC determination, DOC must issue an AD duty order which (1) directs the Customs Service to assess antidumping duties equal to the amount by which foreign market value exceeds the United States price, i.e., the dumping margin; (2) describes the merchandise to which the AD duty applies; and (3) requires the deposit of estimated AD duties pending liquidation of entries, at the same time as estimated normal customs duties are deposited. Customs must assess AD duties within 6 months after DOC receives satisfactory information on which to base the assessment, but no later than 12 months after the end of the annual accounting period within which the merchandise is imported or sold in the United States. The DOC must publish notice of its determination of foreign market value and United States price which shall be the basis for assessment of AD duties and for deposit of estimated AD duties on future entries.

Security in lieu of deposits

The DOC may permit, for not more than 90 days after publication of an AD duty order, the posting of a bond or other security in lieu of the deposit of estimated AD duties if the DOC is satisfied that it will be able to determine, within such 90-day period, the foreign market value and the United States price for all merchandise entered on or after an affirmative LTFV determination (either preliminary or final, whichever is the first affirmative determination) and before publication of an affirmative final injury determination. The determination of such new dumping margin will then provide the basis for assessment of AD duties on the entries for which the posting of bond or other security has been permitted, and will also provide the basis for deposits of estimated AD duties on future entries.

Differences between estimated and final AD duties

If a cash deposit collected as security for estimated AD duties pursuant to an affirmative preliminary LTFV determination is greater than the amount of AD duty assessed pursuant to an AD duty order, then the difference between the deposit and the amount of final AD duty will be refunded for entries prior to notice of the final injury determination. If the cash deposit is lower than the final AD duty under the AD order, then the difference is disregarded. No interest accrues in either case.

If estimated AD duties deposited for entries pending liquidation are greater than the amount of final AD duties determined under an AD order, then the difference will be refunded, together with interest on the amount of overpayment. If estimated AD duties are less than the amount of final AD duties, then the difference will be collected together with interest on the amount of such underpayment.

ADMINISTRATIVE REVIEW

The DOC is required to conduct an annual review of outstanding AD orders and suspension agreements upon request. For all entries of merchandise subject to the review, DOC must determine the foreign market value, United States price, and the amount of dumping margin. Such determination will provide the basis for assessment of AD duties on all entries subject to the review, and for deposits of estimated duties on entries subsequent to the period of review. The results of its annual review must be published together with a notice of any AD duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

A review of a final determination or of a suspension agreement shall be conducted by DOC or ITC whenever it receives information or a request showing changed circumstances sufficient to warrant such review. Without good cause shown, however, no final determination or suspension agreement can be reviewed within 24 months of its notice. The party seeking revocation of an AD order has the burden of persuasion as to whether there are changed circumstances sufficient to warrant revocation.

JUDICIAL REVIEW

An interested party who is dissatisfied with a final determination under the antidumping law may file an action in the U.S. Court of International Trade for judicial review. To obtain judicial review of the administrative action, a summons and complaint must be filed concurrently within 30 days of publication of the final determination. The standard of review used by the Court is whether the determination is supported by "substantial evidence on the record, or otherwise not in accordance with law."

Judicial review of interlocutory decisions, previously permitted, was eliminated by section 623 of the Trade and Tariff Act of 1984. Decisions of the Court of International Trade are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.

Summary of cases under antidumping law since January 1980

Petitions received	44
Petitions dismissed	1
Initiations	44
ITC preliminary injury determinations:	
Negative	3
Affirmative	2
DOC final LTFV determinations:	
Negative	5
Affirmative	21
ITC final injury determinations:	
Negative	5
Affirmative	5
Suspensions of investigation	0
Withdrawals of petition	5
Final AD orders	16

Source: Department of Commerce, Import Administration.

COUNTERVAILING DUTY (CVD) LAW

The Tariff Act of 1930, as amended, provides for the imposition of additional duties whenever a subsidy is bestowed by a foreign country upon the manufacture or production for export of any article which is subsequently imported into the United States. There are currently two separate provisions of the Tariff Act which govern the imposition of countervailing duties. Subtitle A of title VII of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 and amended by the Trade and Tariff Act of 1984,[10] applies to imports from countries which are signatories to the GATT Agreement Relating to Subsidies and Countervailing Measures,[11] commonly referred to as the Subsidies Code, or which have assumed obligations substantially equivalent to those of the Code. For imports from these countries, an injury test is required prior to imposition of countervailing duties. Imports from countries which have not signed the Subsidies Code or assumed substantially equivalent obligations, are subject to the provisions of section 303 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979,[12] and are generally not afforded an injury test in countervailing duty cases. Other than the requirement of an injury test, however, the provisions of the countervailing duty law under the two separate sections are the same.

The purpose of the countervailing duty law is to offset any unfair competitive advantage that foreign manufacturers or exporters might enjoy over U.S. producers as a result of foreign subsidies. Countervailing duties equal to the net amount of the subsidies are imposed upon importation of the subsidized goods into the United States.

BACKGROUND

The first U.S. statute dealing with unfair trade practices was a countervailing duty law passed in 1897. The provisions of the 1897 statute remained substantially the same until 1979, when the U.S. countervailing duty law was changed to conform with the agreement reached in the Tokyo Round of Multilateral Trade Negotiations.

The pre-1979 law required the Secretary of the Treasury to assess countervailing duties on imported dutiable merchandise benefiting from the payment or bestowal of a "bounty or grant." The 1897 law authorized countervailing duties against any bounty or grant on exportation of foreign articles; in 1922 Congress amended the provision to cover bounties or grants on manufacture or production as well as on exportation. The amount of the countervailing duty was to equal the net amount of the "bounty or grant." Prior to 1974 the law applied only to dutiable merchandise and afforded no injury test.

Article VI of the GATT, governing the imposition of countervailing measures by GATT signatories, requires evidence of injury prior to imposition of countervailing duties. The grandfather clause of the GATT, however, allowed the U.S. law to operate without an injury test since the U.S. law predated the GATT.

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[10] 19 U.S.C. 1671.

[11] Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures), MTN/NTM/W/236, reprinted in House Doc. No. 98-153, pt. I at 257.

[12] 19 U.S.C. 1303.

Although the substantive requirements of the countervailing duty law remained virtually the same, the Trade Act of 1974 made two important changes to the CVD law. First, it extended the application of the countervailing duty law for the first time to duty-free imports, subject to an injury test. Second, it made extensive changes in many procedural aspects of the law, which had the effect of limiting executive branch discretion in administering the CVD statute.

GATT Subsidies Code

During the Tokyo Round of Multilateral Trade Negotiations, a multilateral agreement governing the use of subsidies and countervailing measures was concluded and signed by the United States. In order to enforce obligations with regard to the use of subsidies, the agreement provides for improved international procedures for notification, consultation and dispute settlement and, where a breach of an obligation concerning the use of subsidies is found to exist, or a right to relief exists, countermeasures are contemplated. In addition to the availability of countermeasures through the dispute settlement process, countries could also take traditional countervailing duty action to offset subsidies upon a showing of material injury to a domestic industry. The agreement sets out criteria for material injury determinations.

The key provisions of the agreement are as follows:

1. Flat prohibition of export subsidies on non-primary products as well as primary mineral products.

2. A description of export subsidies which supersedes the existing requirement that an export subsidy must result in export prices lower than prices for domestic sales, and includes an updated illustrative list of subsidy practices.

3. With respect to domestic subsidies, for the first time in an international agreement, explicit recognition that while they are often used to promote important objectives of national policy, they can also have harmful trade effects; relief (including countermeasures) is permissible where such subsidies (a) injure domestic producers; and (b) nullify or impair benefits of concessions under the GATT (including tariff bindings); or (c) cause serious prejudice to the interests of other signatories.

4. Recognition that where domestic subsidies are granted on non-commercial terms, trade distortions are especially likely to arise; commitment by signatories to "take into account" conditions of world trade and production (e.g., prices, capacity, etc.) in fashioning their subsidy practices.

5. Improved discipline on use of export subsidies for agriculture. Prohibition on such subsidies when used in a manner which (a) displaces the exports of others or (b) involves material price undercutting in a particular market.

6. Provision for special and differential treatment under which developing countries could not use export subsidies where such subsidies adversely affect the trade or production interests of other

countries; provision for negotiated phase-outs of export subsidies by developing countries.

7. Tight dispute settlement process.

8. Greater transparency regarding subsidy practices (including provision for notification to the GATT of practices of other countries).

9. For countervailing duty actions, an injury and causation test designed to afford relief where subsidized imports (whether an export or domestic subsidy is involved) impact on U.S. producers either through volume or through effect on prices.

10. Greater transparency in the administration of countervailing duty laws and regulations.

Application to U.S. law

Congress approved the GATT Subsidies Code under section 2a of the Trade Agreements Act of 1979. Section 101 of the 1979 Act added a new title VII to the Tariff Act of 1930, containing the new provisions of the countervailing duty law to conform to U.S. obligations under the Subsidies Code. One of the most fundamental changes made by the 1979 Act is the requirement of an injury test in all CVD cases involving imports from "countries under the Agreement"—countries which either are signatories to the Subsidies Code or have assumed substantially equivalent obligations to those under the Code. The provisions of section 303 were retained, however, for cases involving imports from countries which are not "countries under the Agreement." Other changes made by the 1979 Act include the extension of provisional relief for the first time, reduction of the time periods for investigation, and greater opportunities for participation by interested parties.

In 1979, under President Carter's Reorganization Plan No. 3, the responsibility for administering the countervailing duty statute was transferred from the Department of the Treasury to the Department of Commerce.[13]

In 1984, the Trade and Tariff Act of 1984 modified the application of the CVD law to "upstream subsidies"—subsidies bestowed on inputs which are then incorporated into the manufacture of a final product which is exported to the United States. The 1984 Act also made certain other clarifications and procedural changes to the law.

BASIC PROVISIONS

Section 701 of the Tariff Act of 1930, as amended,[14] provides that a countervailing duty shall be imposed, in addition to any other duty, equal to the amount of net subsidy if two conditions are met. First, the Department of Commerce (DOC) must determine that a subsidy is being provided, directly or indirectly, "with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States" and must determine the amount of the net subsidy. Second, the International Trade Commission (ITC) must determine that "an industry in the United

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[13] Exec. Order No. 12188, January 4, 1980, 44 Fed. Reg. 69273.

[14] 19 U.S.C. 1671.

States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise." The countervailing duty will apply whether the merchandise is imported directly or from third countries, and whether or not in the same condition as when exported.

Section 303 of the Tariff Act of 1930, as amended, applies to imports from countries which are not "countries under the Agreement." Under section 303 the second condition of an injury test is not required, except for cases involving duty-free imports from GATT members.

Subsidies

Countervailing duties are imposed in the amount of the net subsidy as determined by the DOC. Subsidies are direct and/or indirect grants for the production or exportation of goods. They can take many forms, including direct cash benefits, credits against taxes, and loans with artificially low interest rates.

Although the statute does not provide an explicit definition of the term "subsidy," it provides that the term shall mean the same as "bounty or grant" under section 303, and provides an illustrative list of subsidies. The list includes, but is not limited to, any export subsidy described in Annex A of the Subsidies Code, and certain specified domestic subsidies if provided to a specific enterprise or industry, or group of enterprises or industries.

To determine the amount of net subsidy on which the CVD will be based, DOC may subtract from gross subsidy the amount of:

(a) any application fee, deposit, or similar payment paid to qualify for or receive the subsidy;

(b) any loss in the subsidy value resulting from deferred receipt mandated by government order; and

(c) export taxes, duties, or other charges on exports to the United States specifically intended to offset the subsidy.

Section 613 of the Trade and Tariff Act of 1984 clarifies the scope of the countervailing duty law with respect to upstream subsidies. An upstream subsidy is defined as any subsidy described in present law that:

(1) is paid or bestowed by a government with respect to an input used to manufacture or produce in that same country merchandise subject to a CVD proceeding;

(2) in the judgment of the DOC bestows a competitive benefit on that merchandise; and

(3) has a significant effect on the cost of manufacture or production of the merchandise.

With regard to the second criterion, the DOC shall decide that a competitive benefit has been bestowed when the price for the input used in manufacture or production of the merchandise subject to investigation is lower than the price the manufacturer or producer would otherwise pay for the input from another seller in an arms-length transaction. Whenever DOC has reasonable grounds to believe or suspect an upstream subsidy is being paid or bestowed, the DOC must investigate whether it is in fact and, if so, include the amount of any competitive benefit, not to exceed the amount of upstream subsidy, in the amount of any CVD imposed on the merchandise under investigation.

The provision on upstream subsidies added by the 1984 Act does not affect the basic definition of subsidy in any way. The potential for an upstream subsidy exists only when a sector-specific benefit meeting all the other criteria of being a subsidy is provided to the input producer. The provision is also limited to subsidies paid or bestowed by the country in which the final product is manufactured.

Material injury

Prior to issuance of a countervailing duty order under title VII, the ITC must determine that the domestic industry is being materially injured, or threatened with material injury, or the establishment of a domestic industry is materially retarded, by reason of subsidized imports at less than fair value. The standard of injury under the countervailing duty law, material injury, is the same standard as that under the antidumping law. Section 771(7) of the Tariff Act of 1930 defines "material injury" as harm which is not inconsequential or unimportant.

The ITC determination of injury basically involves a two-prong inquiry: first, with respect to the fact of material injury, and second, with respect to the causation of such material injury. The ITC is required to analyze the volume of imports, the effect of imports on U.S. prices of like merchandise, and the effects that U.S. imports have on U.S. producers of like products, taking into account many factors, including lost sales, market share, profits, productivity, return on investment, and utilization of production capacity. Also relevant are the effects on employment, inventories, wages, and the ability to raise capital. The ITC is required to cumulatively assess the volume and effect of like imports from two or more countries subject to investigation if the imports compete with each other and with like products of the U.S. industry.

PROCEDURES FOR COUNTERVAILING DUTY INVESTIGATIONS

Initiation of investigation

Countervailing duty investigations may be self-initiated by the DOC or may be initiated as a result of a petition filed by an interested party. Petitions may be filed by any of the following, on behalf of the affected industry: (1) a manufacturer, producer, or wholesaler in the United States of a like product; (2) a certified or recognized union or group of workers which is representative of the affected industry; (3) a trade or business association with a majority of members producing a like product; (4) a coalition of firms, unions, or trade associations that have individual standing. The DOC is required to provide technical assistance to small businesses to enable them to prepare and file petitions under the CVD law.

Petitions are to be filed simultaneously with both the DOC and ITC. Within 20 days after the filing of a petition, the DOC must decide whether or not the petition is legally sufficient to commence an investigation. If so, an investigation is initiated with respect to imports of a particular product from a particular country.

Preliminary ITC injury determination

Within 45 days of the date of filing of the petition, or of self-initiation, the ITC must determine whether there is a "reasonable indication" of material injury, based on the best information available to it at the time. The petitioner bears the burden of proof with respect to this issue. If the ITC preliminary determination is negative, the investigation is terminated. If it is positive, the investigation proceeds.

Preliminary DOC subsidy determination

Within 85 days after the petition is filed or the investigation is self-initiated, the DOC must determine whether there is a "reasonable basis to believe or suspect that a subsidy is being provided." In cases involving upstream subsidies, the time period may be extended to 250 days. This preliminary determination is based on best information available to it at the time. If affirmative, the preliminary determination must include an estimated amount of the net subsidy.

An expedited preliminary determination may be made based on information received during the first 50 days if such information is sufficient and the parties provide a written waiver of verification and an agreement to have an expedited preliminary determination. On the other hand, the preliminary determination may be postponed until 150 days after filing of petition or self-initiation, at the petitioner's request or in cases which DOC determines are extraordinarily complicated.

The effect of an affirmative preliminary determination is twofold: (1) the DOC must order the suspension of liquidation of all entries of foreign merchandise subject to the determination from the date of publication of the preliminary determination. The DOC must also order the posting of a cash deposit, bond, or other appropriate security for each subsequent entry of the merchandise equal to the estimated amount of the net subsidy; (2) the ITC must begin its final injury investigation, and DOC must make all information available to the ITC which is relevant to an injury determination. If the preliminary determination is negative, no suspension of liquidation occurs, and the DOC investigation simply continues.

In cases involving "countries under the Agreement," if the petitioner alleges critical circumstances, the DOC must determine, on the basis of best information available at the time, whether (1) the alleged subsidy is inconsistent with the GATT Subsidies Code; and (2) there have been massive imports of the merchandise over a relatively short period. If the DOC determines critical circumstances exist, then any suspension of liquidation ordered shall retroactively apply to unliquidated entries of merchandise entered up to 90 days prior to the date suspension of liquidation was ordered.

Final DOC subsidy determination

Within 75 days after the date of its preliminary determination, the DOC must issue a final subsidy determination, unless the case involves upstream subsidies, in which case special extended time limits apply. If there are simultaneous investigations under the antidumping and countervailing duty laws involving imports of the same merchandise, the final CVD determination may be postponed until the date of the final determination in an antidumping investigation at the request of a petitioner.

If the final subsidy determination is negative, the investigation is terminated, including any suspension of liquidation which may be in effect, and all estimated countervailing duties are refunded and all appropriate bonds or other security are released. If the final determination is affirmative, the DOC orders the suspension of liquidation and posting of a cash deposit, bond, or other security, if such actions have not already been taken as a result of the preliminary determination, and awaits notice of the ITC final injury determination.

Final ITC injury determination

Within 120 days of a DOC affirmative preliminary determination or 45 days of a DOC affirmative final determination, whichever is longer, the ITC must make a final determination of material injury. If the DOC preliminary determination was negative, and the DOC final determination was affirmative, the ITC has until 75 days after the final affirmative determination to make its injury determination.

Termination or suspension of CVD investigations

Either the DOC or ITC may terminate a CVD investigation upon withdrawal of the petition by petitioner, or by DOC if the investigation was self-initiated. The DOC may not, however, terminate an investigation on the basis of a quantitative restriction agreement limiting U.S. imports of the merchandise subject to investigation unless the DOC is satisfied that termination on the basis of such agreement is in the public interest.

The DOC may suspend a CVD investigation on the basis of one of three types of agreements entered into with the foreign government or with exporters who account for substantially all of the imports under investigation. The three types of agreements are: (1) an agreement to eliminate the subsidy completely or to offset completely the amount of the net subsidy within 6 months after suspension of the investigation; (2) an agreement to cease exports of the subsidized merchandise to the United States within 6 months of suspension of the investigation; (3) an agreement to eliminate completely the injurious effect of subsidized exports to the United States (which, unlike under the antidumping law, may be based on quantitative restrictions). The DOC may not, however, accept any such agreement unless it is satisfied that suspension of the investigation is in the public interest, and effective monitoring of the agreement is practicable.

Prior to actual suspension of an investigation, the DOC must provide notice of its intent to suspend and an opportunity for comment by interested parties. When the DOC decides to suspend the investigation, it must publish notice of the suspension, and issue an affirmative preliminary determination (unless previously issued). The ITC also suspends its investigation. Any suspension of liquidation ordered as a result of the affirmative preliminary determination, however, is to be terminated and all deposits of estimated countervailing duties or bonds posted are to be refunded or released.

If, within 20 days after notice of suspension is published, the DOC receives a request for continuation of the investigation from a domestic interested party or from the foreign government, then both the DOC and ITC must continue their investigations.

The DOC has responsibility for overseeing compliance with any suspension agreement. Intentional violations of suspension agreements are subject to civil penalties.

ASSESSMENT OF CVD DUTIES

Under title VII, both the DOC and ITC must issue affirmative final determinations in order for a CVD duty order to be issued. Within 7 days of notice of an affirmative final ITC determination, the DOC must issue a countervailing duty order which (1) directs the Customs Service to assess countervailing duties equal to the amount of the net subsidy; (2) describes the merchandise to which the CVD applies; and (3) requires the deposit of estimated CVD's pending liquidation of entries, at the same time as estimated normal customs duties are deposited. Customs must assess countervailing duties within 6 months after the DOC receives satisfactory information on which to base the assessment, but no later than 12 months after the end of the annual accounting period within which the merchandise is imported or sold in the United States. The DOC must publish notice of its determination of net susidy which shall be the basis for assessment of CVD's and for deposit of estimated CVD's on future entries.

Differences between estimated and final CVD's

If the cash deposit, bond, or other security for estimated countervailing duties pursuant to an affirmative preliminary determination is greater than the amount of CVD assessed pursuant to a CVD order, then the difference between the deposit and the amount of final CVD will be refunded for entries prior to notice of the final injury determination. If the cash deposit is lower than the final CVD under the CVD order, then the difference is disregarded. No interest accrues in either case.

If estimated countervailing duties deposited for entries pending liquidation are greater than the amount of final CVD's determined under a CVD order, then the difference will be refunded, together with interest on the amount of overpayment. If estimated CVD's are less than the amount of final CVD's then the difference will be collected together with interest.

ADMINISTRATIVE REVIEW

The DOC is required to conduct an annual review of outstanding CVD orders and suspension agreements, upon request. For all entries of merchandise subject to the review, DOC must review and determine the amount of any net subsidy. Such determination will provide the basis for assessment of CVD's on all entries subject to the review, and for deposits of estimated duties on entries subsequent to the period of review. The results of its annual review must be published together with a notice of any CVD to be assessed, estimated duty to be deposited, or investigation to be resumed. The DOC cannot, however, revoke a CVD order or terminate a suspended investigation on the basis of offsets.

A review of a final determination or of a suspension agreement shall be conducted by DOC or ITC whenever it receives information or a request showing changed circumstances sufficient to warrant such review. Without good cause shown, however, no final determination or suspension agreement can be reviewed within 24 months of its notice.

JUDICIAL REVIEW

An interested party who is dissatisfied with a final determination under the countervailing duty law may file an action in the U.S. Court of International Trade for judicial review. To obtain judicial review of the administrative action, a summons and complaint must be filed concurrently within 30 days of publication of the final determination. The standard of review used by the Court is whether the determination is supported by "substantial evidence on the record, or otherwise not in accordance with law."

Judicial review of interlocutory decisions, previously permitted, was eliminated by section 623 of the Trade and Tariff Act of 1984. Decisions of the Court of International Trade are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.

Summary of cases under countervailing duty law since January 1980

Petitions received	40
Petitions dismissed	0
Initiations	39
ITC preliminary injury determinations:	
Negative	3
Affirmative	28
DOC final determinations:	
Negative	5
Affirmative	13
ITC final injury determinations:	
Negative	2
Affirmative	11
Suspensions of investigation	2
Withdrawals of petition	10
Final CVD orders	11

Source: Department of Commerce, Import Administration.

ENFORCEMENT OF UNITED STATES RIGHTS UNDER TRADE AGREEMENTS AND RESPONSE TO CERTAIN FOREIGN PRACTICES: SECTION 301 OF THE TRADE ACT OF 1974

Chapter 1 of title III of the Trade Act of 1974, as amended[15] (commonly referred to as section 301), provides the authority and procedures for the President to enforce U.S. rights under international trade agreements and to respond to certain unfair foreign practices. The predecessor statute, section 252 of the Trade Expansion Act of 1962[16] was repealed and section 301 established in its place under the Trade Act of 1974. Section 301 was amended under title IX of the Trade Agreements Act of 1979[17] in two principal respects to constitute basically the current statute: (1) to include specifically enforcement of U.S. rights and responses to actions by foreign countries inconsistent with or otherwise denying U.S. benefits under trade agreements; and (2) to place specific time limits on each step of the procedures for investigating and taking action on petitions. Some further amendments were enacted under sections 304 and 307(b) of the Trade and Tariff Act of 1984 [18] to clarify certain authorities and practices covered by section 301, and to authorize certain actions with respect to foreign export performance requirements.

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[15] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2411.

[16] Public Law 87-794, sec. 252, approved October 11, 1962.

[17] Public Law 96-39, title IX, approved July 26, 1979.

INTERNATIONAL CONSULTATIONS AND DISPUTE SETTLEMENT

Articles XII and XIII of the General Agreement on Tariffs and Trade (GATT) as elaborated upon by the MTN Texts Concerning a Framework for the Conduct of World Trade,[19] provides the general consultation and dispute settlement procedures applicable to GATT rights and obligations. In addition, the GATT agreements concluded in the 1973-79 Multilateral Trade Negotiations (MTN) on specific nontariff barriers each contain procedures for consulting and seeking to resolve disputes among signatories concerning practices covered by each agreement.

While the specific mechanisms and time limits vary, the general common principles include (1) provisions for bilateral and multilateral consultations seeking to reach a mutually satisfactory solution without resort to dispute settlement; (2) the right of any signatory to a panel, composed of 3 to 5 impartial experts from countries not parties to the dispute acting in their individual capacities, which reviews the dispute and makes findings of fact and law; and (3) submission of panel findings to the Committee on Signatories to the particular MTN agreement or to the GATT Council which reviews the decision and may authorize retaliatory action.

U.S. ENFORCEMENT AUTHORITY AND PROCEDURES

Chapter 1 of title III of the Trade Act of 1974, as amended, provides the domestic counterpart to the GATT consultation and dispute settlement procedures and authority for the President to impose import restrictions as retaliatory action, if necessary to enforce U.S. rights against unjustifiable or unreasonable foreign trade practices which burden, restrict, or discriminate against U.S. commerce. The broad inclusive nature of section 301 authority applies to practices and policies of countries whether or not they are covered by, or are members of, GATT or other trade agreements. The U.S. Trade Representative (USTR) administers the statutory procedures through an interagency committee.

Presidential authority

Under section 301, *if* the President determines that action is appropriate:

(1) to enforce U.S. rights under any trade agreement; or

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[18] Public Law 98-573, approved October 30, 1984.

[19] MTN/FR/W/20/Rev. 2, reprinted in House Doc. No. 96-153, pt. I at 619.

(2) to respond to any act, policy, or practice of a foreign country or instrumentality that (a) is inconsistent with the provisions of, or otherwise denies U.S. benefits under, any trade agreement, or (b) is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce,

then the President *must* take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of the act, policy, or practice.

In addition, the President *may* (1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with the foreign country involved; and (2) impose duties or other import restrictions on the goods of, and notwithstanding any other provision of law, fees or restrictions on the services of, the foreign country for such time as he deems appropriate.

As amended by section 304 of the Trade and Tariff Act of 1984 with respect to services, the President may also restrict the terms and conditions or deny the issuance of any access authorization (e.g., license, permit, order) to the U.S. market issued under Federal law, notwithstanding any other law governing the authorization. Such action can apply only prospectively to authorizations granted or applications pending on or after the date a section 301 petition is filed or the USTR initiates an investigation. Before the President imposes fees or other restrictions on services subject to Federal or State regulation, the USTR must consult as appropriate with the Federal or State agency concerned.

Action under section 301 may be taken on a nondiscriminatory basis or solely against the products or services of the country involved and with respect to any goods or sector regardless of whether they were involved in the particular act, policy, or practice.

The term "unjustifiable" refers to acts, policies, or practices which violate or are inconsistent with U.S. international legal rights, such as denial of national or most-favored-nation treatment, right of establishment, or protection of intellectual property rights. "Unreasonable" refers to acts, policies, or practices which are not necessarily illegal or inconsistent with U.S. international legal rights but are otherwise unfair and inequitable. The term "discriminatory" includes, where appropriate, any act, policy, or practice which denies national or most-favored-nation treatment to U.S. goods, services, or investment. The term "commerce" includes, but is not limited to, services (including transfers of information) associated with international trade, whether or not such services are related to specific products, and U.S. foreign direct investment with implications for trade in goods or services.

Petitions and investigations

Any interested person may file a petition under section 302 with the USTR requesting the President to take action under section 301 and setting forth the allegations in support of the request. The USTR reviews the allegations and must determine within 45 days after receipt of the petition whether to initiate an investigation. The USTR may also self-initiate an investigation in order to advise the President on the exercise of section 301 authority, after consulting with appropriate private sector advisory committees. Public notice of determinations is required, and in the case of decisions to initiate, publication of a summary of the petition and an opportunity for the presentation of views, including a public hearing if timely requested by the petitioner or any interested person.

Section 303 requires use of international procedures for resolving the issues to proceed in parallel with the domestic investigation. The USTR, on the same day as the determination to initiate an investigation, must request consultations with the foreign country concerned regarding the issues raised in the petition. As amended by the 1984 Act, the USTR may delay the request for up to 90 days in order to verify or improve the petition to ensure an adequate basis for consultation.

If the issues are covered by a trade agreement and are not resolved during the consultation period, if any, specified in the agreement, then the USTR is required to promptly request formal dispute settlement under the agreement. The USTR must seek information and advice from the petitioner and from other appropriate private sector representatives in preparing presentations by the United States in the consultation and dispute settlement proceedings.

USTR recommendations and Presidential action

Section 304 sets forth specific time limits within which the USTR must make recommendations to the President, including specifically what action, if any, the President should take under section 301 on the matters raised in the investigation. The recommendations are based on the investigation under section 302, and, if a trade agreement is involved, on the international consultations and, if applicable and timely concluded, the results of the dispute settlement proceedings under the agreement.

From the date of initiation of an investigation, the USTR is required to make a recommendation to the President

—within 7 months if the petition contains only allegations with respect to an export subsidy covered by the MTN Agreement on Subsidies and Countervailing Duties;

—within 8 months if the petition alleges a domestic subsidy or both export and domestic subsidies covered by the Agreement on Subsidies and Countervailing Duties;

—within 30 days after the dispute settlement procedure is concluded if the petition alleges a matter covered by an MTN trade agreement other than the Agreement on Subsidies and Countervailing Duties; or

—within 12 months in any other case.

The applicable deadline is postponed by up to 90 days if consultations with the foreign country involved were so delayed.

If a dispute is not resolved before the close of the minimum period provided for dispute settlement under an MTN agreement (other than the Agreement on Subsidies and Countervailing Duties), the USTR must submit a report to the Congress within 15 days thereafter setting forth the reasons the dispute was not resolved, the status of the dispute proceedings at the close of the minimum period, and the prospects for resolution, and any action contemplated.

The USTR must provide an opportunity for the presentation of views, including a public hearing if requested by an interested person, and to obtain advice from the appropriate private sector advisory representatives before recommending that the President take section 301 action. If expeditious action is required, the USTR must comply with these requirements after making the recommendation to the President. The USTR may request the views of the International Trade Commission on the probable economic impact of taking the action.

Section 301 requires the President to determine within 21 days of receiving the recommendation, what action, if any, he will take and publish notice of the determination. Section 301(c) also authorizes Presidential action in the absence of a petition when he determines it to be warranted. Self-initiated action must be preceded by public notice and, unless the President determines expeditious action is required, by an opportunity for the presentation of views.

Section 306 requires the USTR to keep each petitioner regularly informed of all determinations, recommendations, and developments regarding their case, including the reasons for any undue delays encountered in resolving the matter. The USTR also must submit a report to the Congress on a semiannual basis which summarizes the status of investigations and hearings conducted under section 301 during the preceding 6-month period.

Export performance requirements

Section 307 of the Trade and Tariff Act of 1984 provides new authority to the U.S. Trade Representative requiring him to seek the reduction and elimination of foreign export performance requirements through consultations and negotiations if he determines, with interagency advice, that U.S. action is appropriate to respond to such requirements that adversely affect U.S. economic interests. In addition, the USTR may impose duties or other import restrictions on the products or services of the country, including exclusion from entry of products subject to such requirements. The USTR may provide compensation for such action subject to the provisions of section 123 of the Trade Act of 1974 if necessary or appropriate under U.S. international obligations (for further discussion of section 123, see chapter 6). Section 307 applies only to prospective requirements not affecting existing U.S. foreign direct investments.

Summary of cases under section 301 since January 1975

Petitions rejected	1
Petitions withdrawn	7
Cases terminated:	
Due to resolution of dispute	10
Due to other reasons	3
Cases resulting in retaliatory action	1
Cases suspended	1
Cases pending	11

Source: Office of the Special Trade Representative.

Unfair Practices in Import Trade: Section 337 of the Tariff Act of 1930

Section 337 of the Tariff Act of 1930[20] declares unlawful unfair methods of competition and unfair acts in the importation or sale of articles, the effect or tendency of which is (1) to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or (2) to prevent the establishment of such an industry, or (3) to restrain or monopolize trade and commerce in the United States. The International Trade Commission (ITC) is responsible for investigating alleged violations of section 337. Upon finding a violation, the ITC may issue an exclusion order, or a cease and desist order, subject to Presidential disapproval.

Section 337 is unique among the trade remedy laws in that it is the only one subject to the provisions of the Administrative Procedure Act (APA).[21] All ITC investigations and determinations under section 337 must be conducted on the record after publication of notice and opportunity for hearing in conformity with the APA.[22]

The language of section 337 closely parallels that of section 5 of the Federal Trade Commission Act,[23] and therefore the scope of section 337 has been compared to that of the antitrust and unfair competition statutes. The ITC has significant discretion in determining what practices are "unfair" under section 337. In practice, however, the overwhelming majority of cases dealt with under section 337 has been in the area of patent infringement. Among the few nonpatent cases have been cases involving group boycotts, price fixing, predatory pricing, false labeling, false advertising, and trademark infringement.

Whenever, in the course of a section 337 investigation, the ITC has reason to believe that the matter before it involves dumping or subsidization of imports within the purview of the antidumping or countervailing duty laws, it must notify the administering authority of those laws for appropriate action.[24] If the alleged violation of section 337 is based solely on such dumping or subsidization practices, the ITC must terminate (or not institute) the section 337 investigation. If it is based in part on such practices, and in part on other alleged practices, then the ITC may continue (or institute) an investigation under section 337. This provision is designed to avoid duplication and conflicts in the administration of the unfair trade practice laws.

Procedure

The ITC is required to investigate any alleged violation of section 337 on complaint under oath or upon its initiative. The ITC must conclude its investigation and make its determination at the earliest practicable time within one year, except in more complicated cases which must be concluded within 18 months. In the course of each investigation, the ITC is required to consult with and seek advice and information from the Department of Health and

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[20] Public Law 71-361, sec. 337, approved June 17, 1930, 19 U.S.C. 1337.

[21] Act of June 11, 1946, ch. 324, sections 1-12, 5 U.S.C. 551 et seq.

[22] 19 U.S.C. 1337(c).

[23] Public Law 63-203, approved September 26, 1914, 38 Stat. 717, 15 U.S.C. 45.

[24] 19 U.S.C. 1337(b)(3).

Human Services, the Department of Justice, the Federal Trade Commission, and other appropriate departments and agencies.

If a violation of section 337 is found, the ITC must direct that the foreign articles be excluded from entry into the United States, unless it determines that such articles should not be excluded in consideration of the effect of exclusion on:

(a) the public health and welfare;
(b) competitive conditions in the U.S. economy;
(c) the production of like or directly competitive articles in the United States; and
(d) U.S. consumers.

In appropriate circumstances, the ITC may issue temporary exclusion orders during the course of an investigation if it determines that there is reason to believe that there is a violation of section 337. In the event of a temporary exclusion order, entry is to be permitted only under bond.

In lieu of issuing an exclusion order, the ITC may issue an appropriate cease and desist order to be served on the violating party or parties, unless it finds that such order should not be issued in consideration of the effect of such order on the same public interest factors listed above.

The ITC may at any time, upon such notice and in such manner as it deems proper, modify or revoke any cease and desist order, and issue an exclusion order in its place.

Any person who violates a cease and desist order issued under this section shall be subject to a civil penalty of up to the greater of $10,000 per day or the domestic value of the articles entered or sold on such day in violation of the order.

Presidential and judicial review

Following an ITC determination of a violation of section 337, the President may, within 60 days after receiving notification, disapprove the ITC determination for "policy reasons." The statute does not specify what types of policy reasons may provide the basis for disapproval. Upon Presidential disapproval, actions taken by the ITC cease to have effect. If the President does not disapprove the ITC determination, or if he approves it, then the ITC determination becomes final. Any person adversely affected by a final ITC determination under section 337 may appeal the determination to the U.S. Court of Appeals for the Federal Circuit.

Summary of cases under section 337 since January 1975

Cases completed	169
Cases terminated	122
On the basis of a settlement agreement	73
On the basis of a negative ITC determination (no violation)	49
Cases resulting in an exclusion order or a cease-and-desist order	47
Cases in which President overturns an ITC order for policy reasons	1

Source: International Trade Commission.

Fair Trade Laws

RELIEF FROM INJURIOUS INCREASED IMPORT COMPETITION: SECTIONS 201-203 OF THE TRADE ACT OF 1974

Sections 201-203 of the Trade Act of 1974 [25] as amended by sections 248 and 249 of the Trade and Tariff Act of 1984 [26] set forth the standard procedures and authorities for U.S. industries and workers to obtain temporary relief from injurious increased import competition.

From the outset of the trade agreements program in 1934, U.S. policy of seeking liberalization of trade barriers has been accompanied by recognition that difficult economic adjustment problems could result for particular sectors of the economy and that the possibility of serious injury to domestic industries by increased import competition should be minimized. Beginning with bilateral trade agreements in the early 1940's, U.S. law has contained a so-called "escape clause" provision for import relief which, while amended over the years, has basically provided authority for the President to withdraw or modify trade concessions and impose duties or other restrictions on imports of any article which causes or threatens serious injury to the domestic industry producing a like or directly competitive article, following an investigation and determination by the International Trade Commission (ITC).

Under his basic trade agreements authority in section 350 of the Tariff Act of 1930 the President issued three Executive Orders setting forth procedures and criteria for escape-clause relief which governed from 1947 to 1951. Section 7 of the Trade Agreement Extension Act of 1951 contained the first statutory procedure and criteria for escape-clause action, which governed from 1951 until replaced by sections 301, 351 and 352 of the Trade Expansion Act of 1962. The 1962 provisions, which also introduced the concept of trade adjustment assistance (see separate section), were repealed and replaced by sections 201-203 of the Trade Act of 1974.

Primarily at U.S. insistence, an escape clause provision modeled after language in the 1947 Executive Order was included in the General Agreement on Tariffs and Trade (GATT) as Article XIX.[27] In order to restore and maintain the mutual balance of previously agreed GATT trade agreement obligations, countries adversely affected by import relief actions may make offsetting withdrawals or modifications of concessions, or the country taking the import relief action may seek agreement on new concessions as compensation (see chapter 6 on trade agreement authorities for description of U.S. law).

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[25] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2251.

[26] Public Law 98-573, approved October 30, 1984.

[27] The language is as follows: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

Petitions and investigations (section 201)

An entity representative of an industry (including a trade association, firm, union or group of workers) may file a petition under section 201(a) of the Trade Act of 1974 with the ITC for import relief. The petition must state the purposes of seeking relief, such as facilitating orderly transfer of resources to alternative uses or other adjustment to new conditions of competition. Alternatively, the President, U.S. Trade Representative, or the House Committee on Ways and Means or Senate Committee on Finance may request an investigation.

Upon petition, request, or on its own motion, the ITC conducts an investigation under section 201(b) "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." Substantial cause is defined as "a cause which is important and not less than any other cause."

In making its determinations the Commission must take into account all relevant economic factors such as those enumerated in section 201(b), as amended by section 249 of the Trade and Tariff Act of 1984.[28] The Commission may determine to treat as the domestic industry: (1) only the domestic production of a producer which also imports; (2) only the portion or subdivision producing the like or directly competitive article of a producer of more than one article; and (3) only production concentrated in a major geographic area under certain circumstances.

A public hearing is required during the course of the investigation. Whenever during the investigation the Commission has reason to believe increased imports are attributable in part to unfair trade practices, then it must promptly notify the agency administering the appropriate remedial law.

If the Commission makes an affirmative injury determination, it must (1) find the amount of the increase in, or imposition of, any duty or other import restriction which is necessary to prevent or remedy the injury, or (2) if it finds that adjustment assistance can effectively remedy the injury, recommend the provision of such assistance.

The Commission must report to the President and publish the results of its investigation, including its findings on the injury question and any recommendations concerning relief, within 6 months after instituting the investigation. The report must also include information on efforts by workers and firms in the industry to compete more effectively with imports.

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[28] With respect to serious injury, the significant idling of productive facilities (including plant closings or capacity underutilization) in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry;

With respect to threat of serious injury, a decline in sales, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, or employment (or increasing underemployment) in the domestic industry concerned; and

With respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic producers. The presence or absence of any factor is not necessarily dispositive.

Unless the Commission determines good cause exists, it cannot investigate the same subject matter within one year after its report to the President on a previous investigation.

Presidential action (section 202)

If the Commission makes an affirmative injury determination, and recommends the provision of import relief (as opposed to adjustment assistance), section 202 requires the President within 60 days to determine what, if any, relief to provide. The President is required (1) to provide import relief unless he determines it is not in the national economic interest, and (2) to evaluate the extent to which adjustment assistance is available to workers and firms in the industry, and may direct expeditious consideration of petitions. If the Commission recommends adjustment assistance, the President must direct expeditious consideration of petitions.

In making this decision, the President must take into account various factors enumerated in sections 202(c) and 203(k)(2) and any other relevant considerations. These factors are of a broader nature than the injury to the particular domestic industry investigated by the Commission and concern the national economic consequences of providing or not providing relief.

Nature and timing of import relief (section 203)

Section 203 authorizes the President to provide import relief in the form of:

1. An increase in, or imposition of, tariffs (not exceeding a rate 50 percent above the existing duty level);
2. A tariff-rate quota;
3. Quantitative restrictions on imports;
4. Negotiation of orderly marketing agreements (OMA's); or
5. A combination of such actions.

Import restrictions may be imposed on a discriminatory basis, but only after considering U.S. international obligations, including the GATT most-favored-nation principle. Import relief measures must be proclaimed within 15 days after a decision to provide relief, or within 90 days in the case of a decision to negotiate OMA's.

On the same day the President determines import relief is not in the national economic interest or he decides to provide import relief, the President must report to the Congress his decision and the reasons therefor, including reasons for any difference in action taken from that recommended by the ITC. Under section 203(c) as amended by section 248 of the Trade and Tariff Act of 1984, Congress may adopt a joint resolution of disapproval within 90 legislative days under the expedited procedures of section 152 of the Trade Act if the President takes action which is different from that recommended by the Commission or if the President declines to take any action. Under these procedures, resolutions are referred to the House Committee on Ways and Means and the Senate Committee on Finance, which are subject to a motion to discharge if the resolution has not been reported within 30 legislative days. No amendments to the motion or to the resolution are in order. Within 30 days after enactment of such a resolution, the President must proclaim the relief recommended by the Commission.

The President may subsequently negotiate OMA's and suspend or terminate the original form of relief. Any quotas or OMA's must permit importation of a quantity or value of the article which is not less than that entered during the most recent representative period. In order to carry out an OMA with one or more countries accounting for a major part of U.S. imports, the President may regulate imports of like articles from countries not party to the agreement. If an OMA does not continue to be effective, the President may provide import relief.

An increase in duty may take the form of suspension of items 806.30 or 807.00 of the Tariff Schedules of the United States if the Commission determines in its investigation that the actual or threatened serious injury results from their application Suspension of duty-free treatment under the Generalized System of Preferences (GSP) may also be treated as a tariff increase, but cannot be the sole form of relief unless the Commission determines in its investigation that the injury results from GSP treatment.

Relief is temporary in order to encourage adjustment of the industry to increased import competition. Relief may be provided initially for up to 5 years. To the extent feasible, any relief provided for more than 3 years must be phased down, the first reduction taking effect no later than the beginning of the fourth year. So long as the relief remains in effect, the Commission must keep under review developments in the industry and report them to the President upon his request.

If the industry petitions the Commission within 6 to 9 months prior to the expiration of the initial relief period for an extension, the Commission must advise the President of its judgment as to the probable economic effect on the industry of terminating relief. The Commission must hold a public hearing during its investigation. The President may extend relief for one period of up to 3 years at a level no greater than in effect immediately prior to the extension.

The President may reduce or terminate import relief at any time during the initial or extended period if he determines such action is in the national interest, after taking into account advice from the Commission on the probable economic effect on the industry and advice of the Secretaries of Commerce and Labor.

No new section 201 investigation can take place until 2 years after import relief has been in effect on the article.

Summary of cases under section 201 since January 1975

Cases completed	53
Negative ITC determinations	22
Affirmative or tied ITC determinations	31
Cases in which President provided import relief other than trade adjustment assistance	11

Source: International Trade Commission.

RELIEF FROM MARKET DISRUPTION BY IMPORTS FROM COMMUNIST COUNTRIES: SECTION 406 OF THE TRADE ACT OF 1974

Section 406 was established under the Trade Act of 1974[29] to provide a remedy against market disruption caused by imports from Communist countries. The provision applies to imports from any Communist country, irrespective of whether it has in the past or currently receives nondiscriminatory most-favored-nation treatment. Enactment of section 406 resulted from concern that traditional remedies of unfair trade practices, such as the antidumping and countervailing duty laws, may be insufficient to deal with the disruptive impact on U.S. industry of a sudden and rapid influx of substantial imports that can result from Communist country control of their pricing levels and distribution process. The provisions of sections 201–203 of the Trade Act generally apply to section 406 cases, except that section 406 provides a lesser standard of injury causation and a faster relief procedure than under normal import relief procedures, as described below. The provision has not been amended since 1974.

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[29] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2436.

Under section 406(a), the International Trade Commission (ITC) conducts investigations to determine whether imports of an article produced in a Communist country are causing market disruption with respect to a domestically produced article. Market disruption exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry. The term "Communist country" means any country dominated or controlled by communism.

The ITC conducts such investigations at the request of the President or the U.S. Trade Representative, upon resolution of either the House Committee on Ways and Means or the Senate Committee on Finance, on its own motion, or upon the filing of a petition by an entity (including a trade association, firm, union, or a group of workers) which is representative of an industry. The Commission must complete its investigation within 3 months including a public hearing.

If the ITC finds that market disruption exists, it must also recommend to the President relief in the form of rates of duty or quantitative restrictions that will prevent or remedy such market disruption. The President then has 60 days to advise Congress as to what, if any, relief he will proclaim. Any import relief must be proclaimed within 15 days after the determination to provide it, except that the President has an additional 60 days to negotiate an orderly marketing agreement if he decides to provide relief in that form. Relief applies only to imports from the subject Communist country. Relief is limited to a maximum 5-year period subject to one renewal of up to 3 years as in normal import relief cases.

Section 406(c) authorizes the President, prior to an ITC determination, to take temporary emergency action with respect to imports from a Communist country whenever he finds that there are reasonable grounds to believe there is market disruption. When taking such action, the President must also request the Commission to conduct an investigation under section 406(a). Any emergency relief ceases to apply on the day the Commission makes a negative finding or on the effective date of action by the President following an affirmative ITC finding.

Summary of cases under section 406 since January 1975

Cases completed	10
Negative ITC determinations	7
Affirmative or tied ITC determinations	3
Cases in which President provided import relief	0

Source: International Trade Commission.

Trade Adjustment Assistance

The trade adjustment assistance (TAA) programs were first established under the Trade Expansion Act of 1962 [30] for the purpose of assisting in the special adjustment problems of workers and firms dislocated as a result of Federal policy to liberalize trade barriers. As a result of limited eligibility and usage of the programs, criteria and benefits were liberalized under title II of the Trade Act of 1974.[31] Extensive amendments in the worker program under title XXV of the Omnibus Budget Reconciliation Act of 1981 (OBRA),[32] particularly in program eligibility and benefits, were intended to reduce program cost significantly and to shift its focus from income compensation for temporary layoffs to return to work through training and other adjustment measures for the long-term or permanently unemployed. The OBRA also made relatively minor modifications in the firm program. Most amendments became effective on October 1, 1981. Both programs were extended at that time for 1 year, to terminate on September 30, 1983.

Public Law 98-120 (H.R. 3813 as amended by the Senate), approved on October 12, 1983, extended the worker and firm TAA programs for 2 years until September 30, 1985. Sections 2671-2673 of the Deficit Reduction Act of 1984 [33] contains three provisions [34] amending the program for workers to increase the availability of worker training allowances and the level of job search and relocation benefits and the program for firms to increase the availability of industrywide technical assistance.

TRADE ADJUSTMENT ASSISTANCE PROGRAM FOR WORKERS

Trade adjustment assistance for workers under sections 221 through 250 of the Trade Act of 1974, as amended, consists of trade readjustment allowances (TRA), employment services, training and extended TRA allowances while in training, and job search and relocation allowances for certified and otherwise qualified workers. The program is administered by the Employment and Training Administration (ETA) of the Department of Labor through State employment security agencies under cooperative agreements between each State and the Secretary of Labor. ETA processes petitions and issues certifications or denials of petitions by groups of workers for eligibility to apply for TAA. The State agencies act as Federal agents in processing applications and determining individual worker eligibility for benefits, issuing payments, and providing reemployment services and training opportunities.

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[30] Public Law 87-794, approved October 11, 1962.

[31] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2251.

[32] Public Law 97-35, title XXV, approved August 13, 1981, 19 U.S.C. 2272-2395.

[33] Public Law 98-369, approved July 18, 1984, 19 U.S.C. 2296.

[34] Sections 3, 6, and 8 of H.R. 3391 as passed by the House on September 15, 1983.

Certification requirements

A two-step process is involved in the determination of whether an individual worker will receive trade adjustment assistance; (1) certification by the Secretary of Labor of a petitioning group of workers in a particular firm as eligible to apply; and (2) approval by the State agency administering the program of the application for benefits of an individual worker covered by a certification.

The process begins by a group of three or more workers, their union, or authorized representative filing a petition with the ETA for group eligibility. To certify a petitioning group of workers as eligible to apply for adjustment assistance, the Secretary must determine that three conditions are met:

1. A significant number or proportion of the workers in the firm or subdivision of the firm have been or are threatened to be totally or partially laid off;
2. Sales and/or production of the firm or subdivision have decreased absolutely; and
3. Increased imports of articles like or directly competitive with articles produced by the firm or subdivision of the firm have "contributed importantly" to both the layoffs and the decline in sales and/or production.

Eligibility requirements for trade readjustment allowances

In order to receive entitlement to a trade readjustment allowance for any week of unemployment, an individual worker covered by a certification must file an application with the State employment security office and meet the following eligibility requirements:

1. The worker's last total or partial layoff before application must have occurred not more than 1 year prior to the date of the petition, on or after the "impact date" (i.e., the date on which total or partial layoffs began or threatened to begin), within 2 years after the date the Secretary of Labor issued the certification covering the worker, and before the termination date (if any) of the certification; and
2. The worker was employed at least 26 of the 52 weeks preceding last layoff in adversely affected employment with a single firm or subdivision thereof at wages of $30 or more per week.

A week of employment includes the week in which layoff occurs and up to 3 weeks of employer-authorized vacation, sick, injury, maternity, or military leave, or service as a union representative, up to 7 weeks of disability covered by workmen's compensation, or up to 7 weeks of leave and disability combined, of which no more than 3 weeks may consist of authorized leave.

In addition, the OBRA amended the program to include the following TRA eligibility limitations:

1. Under the program prior to October 1, 1981, TRA benefits were a supplement to State unemployment insurance and paid concurrently during weeks the worker was eligible for UI. A fundamental change under the current program makes TRA benefits a continuation of the UI program by requiring the worker to exhaust all rights to UI, including any extended ben-

efits (EB) or Federal supplemental compensation (FSC), to which the worker is entitled in the most recent benefit period before becoming eligible for any TRA payments. The worker is also ineligible for TRA benefits for any subsequent week of entitlement to payment for any further UI or waiting period credit.

2. All TRA claimants in all States are subject to the provisions of the EB "suitable work" test under section 202(a)(3) of the Federal-State Extended Unemployment Compensation Act of 1970 after the end of their regular UI benefit period as a precondition for receiving any weeks of TRA payments. Workers are not disqualified for TRA benefits if in State-approved training prior to eligibility or for any form of TAA because of subsequently leaving employment which is not of a substantially equal or higher skill and wage level than previous employment.

3. Workers are entitled to TRA payments only for weeks of unemployment which begin more than 60 days after the filing date of the petition, i.e. after the statutory deadline for certification. Workers can continue to be certified for layoffs occurring up to 1 year prior to the petition filing date in order to qualify for other TAA benefits, but can no longer receive TRA payments retroactively beyond the date certification is supposed to take place.

4. No TRA payment can be made for a UI waiting week.

5. As a further encouragement to reemployment, the Secretary of Labor may require all workers in a labor market area with certain economic characteristics either to accept training or to extend job search beyond their labor market area after their first 8 weeks of TRA eligibility if they have been approved for training.

Benefit levels and duration

TRA benefits prior to October 1, 1981, were 70 percent of the worker's former gross weekly wage not to exceed the average weekly manufacturing wage, reduced by the amount of any unemployment compensation entitlement, 50 percent of any part-time earnings, and certain training allowances paid under Federal law. Eligible workers could collect basic benefits for up to 52 weeks of unemployment during a maximum 2-year period following layoff.

The following major changes under the OBRA, effective as of October 1, 1981, reduced program costs and were intended to remove reemployment disincentives associated with the previous high net wage replacement and the inequity in benefit amounts between import-impacted workers and workers laid off for other reasons:

1. The TRA weekly benefit amount is the same as, and a continuation of, the claimant's unemployment insurance weekly benefit amount during the most recent UI benefit period, reduced by any training allowance and disqualifying income deductible under UI law. This change shifted the TRA benefit level from a uniform national standard to a State standard.

2. The total amount of basic TRA benefits payable to a worker is a maximum of 52 times the TRA allowance level for a week of total unemployment minus the total amount of UI

benefits payable in the worker's most recent benefit period (e.g., a worker receiving 39 weeks of UI regular and extended benefits could receive a maximum 13 weeks of TRA benefits). UI and TRA payments combined are limited to a maximum 52 weeks in all cases involving extended benefits. TRA basic benefits may be collected only during the 52-week period following the week in which the worker has exhausted all rights to regular unemployment compensation in the most recent benefit period. The purpose of the shortened collection period was to reduce payment of TRA benefits during periods of non-trade-related unemployment.

3. Workers may receive up to 26 additional weeks of TRA benefits to assist in completing approved training, if the worker applies for the training program within 210 days (compared to 180 days previously) after certification or layoff, whichever date is later. The additional benefits may be collected only during the 26-week period (compared to 52-week period under the previous program) following the worker's last week of entitlement to basic TRA benefits. As amended in 1984, if training has not been approved until after the last week of entitlement to basic TRA, the 26-week collection period begins with the first week of training.

Training and other employment services, job search and relocation allowances

Training and other employment services and job search and relocation allowances are available through State agencies to certified workers whether or not they have exhausted UI benefits and become eligible for TRA payments.

Employment services consist of counseling, vocational testing, job search and placement, and other supportive services, as appropriate.

Training, preferably on-the-job, *may* be approved for a worker if the following five conditions are met: (1) there is no suitable employment available; (2) the worker would benefit from appropriate training; (3) there is a reasonable expectation of employment following training completion; (4) approved training is available from government agencies or private sources; and (5) the worker is qualified to undertake and complete such training. While training itself is not an entitlement even if the above conditions are met, if training is approved, a worker is entitled to payment of the costs. As a result, the Department of Labor has added administratively another condition prohibiting State agencies from approving training if sufficient funds have not been appropriated and allocated to pay the costs.

Supplemental assistance is available to defray reasonable transportation and subsistence expenses for separate maintenance when training is not within the worker's commuting distance, equal to the lesser of actual per diem expenses or 50 percent of the prevailing Federal per diem rate for subsistence and prevailing mileage rates under Federal regulations for travel expenses.

Job search allowances are available to certified workers who cannot obtain suitable employment within their commuting area, are totally laid off, and who apply within 1 year after certification or last total layoff, whichever is later, or within 6 months after concluding training. As amended in 1981 and 1984, the allowance for reimbursement is equal to 90 percent of necessary job search expenses, based on the same increased supplemental assistance rates described above, up to a maximum amount of $800.

Relocation allowances are available to certified workers totally laid off at time of relocation who have been able to obtain an offer of or actual suitable employment only outside their commuting area, who apply within 14 months after certification or last total layoff, whichever is later, or within 6 months after concluding training, and whose relocation takes place within 6 months after application or completion of training. As amended in 1981 and 1984, the allowance is equal to 90 percent of reasonable and necessary expenses for transporting the worker, family, and household effects, based on the same increased supplemental assistance rates described above, plus a lump sum payment of three times the worker's average weekly wage up to a maximum amount of $800.

Funding

Federal funds, through annual appropriations from Treasury general revenues, cover only the portion of the worker's total entitlement represented by the continuation of UI benefit levels in the form of TRA payments, plus the salaries and expenses for ETA personnel administering the program. Funds made available under grants to States defray expenses of any employment services. Funding for training, job search and relocation allowances and related expenses is subject to annual appropriations.

The States are reimbursed from Treasury general revenues for benefit payments and other costs incurred under the program. A penalty under section 239 of the Trade Act of 1974 provides for reduction by 15 percent of the credits for State unemployment taxes which employers are allowed against their liability for Federal unemployment tax if a State has not entered into or has not fulfilled its commitments under a cooperative agreement.

TRADE ADJUSTMENT ASSISTANCE PROGRAM FOR FIRMS

Sections 251 through 264 of the Trade Act of 1974, as amended, contain the procedures, eligibility requirements, benefits and their terms and conditions, and administrative provisions of the trade adjustment assistance program for firms adversely affected by increased import competition. Administration of the program was transferred in 1982 within the Department of Commerce from the Economic Development Administration to the International Trade Administration.

Program benefits consist of technical and/or financial assistance for petitioning firms which qualify under a two-step procedure: (1) certification by the Secretary of Commerce that the petitioning firm is eligible to apply, and (2) approval by the Secretary of Commerce of the application by a certified firm for benefits, including the firm's proposal for economic adjustment.

To certify a firm as eligible to apply for adjustment assistance, the Secretary must determine that three conditions are met:

1. A significant number or proportion of the workers in the firm have been or are threatened to be totally or partially laid off;
2. Sales and/or production of the firm have decreased absolutely; and
3. Increased imports of articles like or directly competitive with articles produced by the firm have "contributed importantly" to both the layoffs and the decline in sales and/or production.

A certified firm may file an application with the Secretary of Commerce for trade adjustments assistance benefits at any time within 2 years after the date of the certification of eligibility. The application must include a proposal by the firm for its economic adjustment. The Secretary may furnish technical assistance to the firm in preparing its petition for certification and/or in developing a viable economic adjustment proposal.

The firm's application must meet the following requirements for approval of technical and/or financial assistance:

1. The firm has no reasonable access to financing through the private capital market.
2. The adjustment proposal demonstrates that the assistance sought (a) is reasonably calculated to make a material contribution to the economic adjustment of the firm in establishing a competitive position in the same or a different industry; (b) gives adequate consideration to the interest of the workers in the firm; and (c) demonstrates the firm will make all reasonable efforts to use its own resources for economic development.

In addition, the Secretary must determine that a firm seeking financial assistance (1) does not have the required funds available from its own resources; and (2) there is reasonable assurance that the loan will be repaid.

Benefits

Technical assistance and financial assistance may be furnished singly or in combination to certified firms with approved applications.

Technical assistance may be given to implement the firm's economic adjustment proposal in addition to, or in lieu of, precertification assistance or assistance in developing the proposal. It may be furnished through existing government agencies or through private individuals, firms, and institutions (including private consulting services), or by grants to intermediary organizations, including regional Trade Adjustment Assistance Centers. The Federal share cannot exceed 75 percent of the cost of assistance furnished through private individuals, firms, or institutions. Grants may be made to intermediate organizations to defray up to 100 percent of their administrative expenses in providing technical assistance.

As amended in 1984, the Secretary of Commerce also may provide technical assistance of up to $10 millon annually per industry to establish industrywide programs for new product or process development, export development, or other uses consistent with adjustment assistance objectives. The assistance may be furnished through existing agencies, private individuals, firms, universities, and institutions, and by grants, contracts, or cooperative agreements to associations, unions, or other nonprofit organizations of industries in which a substantial number of firms or workers have been certified.

Financial assistance may be direct loans and/or loan guarantees for (1) acquiring, constructing, installing, modernizing, developing, converting, or expanding land, plant, buildings, equipment, facilities, or machinery; or (2) supplying such working capital as may be necessary to enable the firm to implement its adjustment proposal. The Secretary, in considering whether to provide financial assistance, must give preference to firms which establish an employee stock ownership plan.

Direct loans to any firm cannot exceed an aggregate amount of $1 million outstanding at any time. The interest rate is determined by the Secretary of the Treasury, plus an amount adequate to cover administrative costs and probable losses under the program.

Loan guarantees to any firm cannot exceed an aggregate amount of $3 million outstanding at any time. No loan can be guaranteed for more than 90 percent of the balance of the loan outstanding.

Maturities of direct loans and loan guarantees normally cannot exceed 10 years on working capital loans and 25 years or the useful life of the fixed assets, whichever is less, on loans for land, plant, building, equipment, or machinery.

Funding

Funds to cover all costs of the program are subject to annual appropriations to the International Trade Administration of the Department of Commerce from general revenues.

Chapter 3: OTHER LAWS REGULATING IMPORTS

Authority To Negotiate Agreements Limiting Imports of Agricultural and Textile Products: Section 204 of the Agricultural Act of 1956

Section 204 of the Agricultural Act of 1956, as amended,[1] authorizes the President to negotiate agreements with foreign governments to limit their exports of agricultural or textile products to the United States. The President is authorized to issue regulations governing the entry of products subject to international agreements concluded under this section. Furthermore, if a multilateral agreement is concluded among countries accounting for a significant part of world trade in the articles concerned, the President may also issue regulations governing entry of those same articles from countries which are not parties to the multilateral agreement.

The authority provided under section 204 has been used to negotiate bilateral agreements restricting the exportation of certain meats to the United States,[2] as well as to implement an agreement with the European Communities (EC) restricting U.S. importation of certain cheeses from the EC.[3] Section 204 also provides the legal basis for the GATT Arrangement Regarding International Trade in Textiles, commonly referred to as the Multifiber Arrangement,[4] and for U.S. bilateral agreements with 29 textile-exporting nations.

MULTIFIBER ARRANGEMENT (MFA)

The Multifiber Arrangement (MFA) is a multilateral agreement negotiated under the auspices of the GATT among 41 countries. The MFA provides a general framework and guiding principles for the negotiation of bilateral agreements between textile importing and exporting countries, or for unilateral action by an importing country if an agreement cannot be reached. In effect since 1974, the MFA was established to deal with problems of market disruption in textiles trade, while permitting developing countries to share in expanded export opportunities.

Background

The first voluntary agreement to limit exports of cotton textiles to the United States was negotiated with Japan in 1937. Through the 1950's cotton textile imports, especially from Japan, continued to increase and generate pressure for import restraints. In 1956, the Congress passed the Agricultural Act of 1956 which, among other things, provided negotiating authority for agreements restricting imports of textile products. Pursuant to this authority, the United States negotiated a 5-year voluntary restraint agreement on cotton textile exports from Japan, announced in January 1957.

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[1] Public Law 84-540, ch. 327, approved May 28, 1956, 70 Stat. 200, as amended by Public Law 87-488, approved June 19, 1962, 76 Stat. 104, 7 U.S.C. 1854.

[2] Exec. Order No. 11539, June 30, 1970, 35 Fed. Reg. 10733, as amended by Exec. Order No. 12188, Jan. 2, 1980, 45 Fed. Reg. 989. See discussion of Meat Import Act of 1979, infra.

[3] Exec. Order No. 11851, April 10, 1975, 40 Fed. Reg. 16645.

[4] Arrangement Regarding International Trade in Textiles, T.I.A.S. 7840 (1973) (expires 1986).

As textile and apparel imports from low-wage developing countries began to rise, pressure mounted for a more comprehensive approach to the import problem. On May 2, 1961, President Kennedy announced a Seven Point Textile Program, one point of which called for an international conference of textile importing and exporting countries to develop an international agreement governing textile trade. On July 17, 1961, a textile conference was convened under the auspices of the GATT. The discussions culminated in the promulgation of the Short-Term Arrangement on Cotton Textile Trade (STA) on July 21, 1961.[5] The STA covered the year October 1, 1961, to September 30, 1962, and established a GATT Cotton Textiles Committee to negotiate a long-range cotton textile agreement.

From October 1961 through February 1962, the STA signatories met in Geneva and negotiated a Long-Term Arrangement for Cotton Textile Trade (LTA), to last for 5 years beginning October 1, 1962.[6] The LTA provided for negotiation of bilateral agreements between cotton textile importing and exporting countries, and for imposition of quantitative restraints on particular categories of cotton textile products from particular countries when there was evidence of market disruption. In June of 1962, section 204 of the Agricultural Act of 1956 was amended to give the President authority to control imports from countries which did not sign the LTA.[7]

In the fall of 1965 the LTA was reviewed, and criticism within the U.S. textile industry mounted with respect to the LTA's failure to cover man-made fiber textiles. In 1967, however, the LTA was extended for 3 additional years with no additional fiber coverage. In 1970, the LTA was again extended for 3 more years.

Meanwhile, the approach of negotiating multifiber agreements limiting imports not only of cotton but also of wool and man-made fiber textiles was used by the Nixon administration on a bilateral basis. On October 15, 1971, bilateral multifiber agreements were announced with Japan, Hong Kong, South Korea, and Taiwan. A multilateral agreement, incorporating the provisions of the bilaterals with Hong Kong, South Korea, and Taiwan, was also signed to allow the United States the authority, under section 204 of the Agricultural Act of 1956 as amended in 1962, to impose quantitative restrictions unilaterally on non-signatory countries.

The following year, in June 1972, efforts to negotiate a multifiber agreement on a multilateral basis led to the establishment of a GATT working party to conduct a comprehensive study of conditions of world trade in textiles. The working group submitted its study to the GATT Council early in 1973. In the fall of that year, multilateral negotiations for a multifiber agreement began after passage of a 3-month extension of the LTA. The Multifiber Arrangement was concluded on December 20, 1973, and came into force January 1, 1974.

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[5] T.I.A.S. 4884 (1961) (expired 1962).
[6] T.I.A.S. 5240 (1962) (expired 1973).
[7] Public Law 87-488, approved June 19, 1962, 76 Stat. 104.

MFA provisions

The MFA was modeled after the LTA and provides for bilateral agreements between textile importing and exporting nations (Article 4) and for unilateral actions following a finding of market disruption (Article 3).[8] Quantitative restrictions are to be based on past volumes of trade, with the right, within certain limits, to transfer the quota amounts between products and between years. The MFA also provides for a minimum annual growth rate of 6 percent.[9] Quotas already in place had to be conformed to the MFA or abolished within a year. The products covered by the MFA include all manufactured products whose chief value is represented by cotton, wool, man-made fibers or a blend thereof. Also included are products whose chief weight is represented by cotton, wool, man-made fibers or a blend thereof.

A Textile Surveillance Body (TSB) was established to supervise the implementation of the MFA. The TSB is composed of a chairman and eight members from among the MFA signatories chosen by the GATT Textiles Committee. The TSB receives notification of all actions taken and agreements concluded under the MFA, examines them for conformity with the MFA, discusses those in dispute with the principals involved, and offers, where appropriate, nonbinding recommendations to the governments involved. It reports at least annually to the GATT Textiles Committee.

MFA I was in effect for 4 years, until the end of 1977. During MFA renewal negotiations in July 1977 the EC succeeded in putting in the renewal protocol a provision allowing jointly agreed "reasonable departures" from the MFA requirements in negotiating bilateral agreements. The MFA was then renewed for 4 more years.[10]

MFA II was in effect through December 1981. On December 22, 1981, a protocol was initialed extending the MFA for an additional four and a half years, and providing a further interpretation of MFA requirements in light of 1981 conditions.[11] MFA III is due to expire on July 31, 1986.

BILATERAL TEXTILE AGREEMENTS

Under the authority of section 204 of the Agricultural Act of 1956, as amended, and in conformity with the MFA, the President has negotiated bilateral agreements restricting textile exports from various supplier countries. There are 29 such bilateral agreements currently in force. The agreements apply to textile products, covering not only fiber and fabric, but apparel as well.

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[8] Market disruption exists when domestic producers are suffering "serious damage" or the threat thereof. Factors to be considered in determining whether the domestic producers are seriously damaged include: turnover, market share, profit, export performance, employment, volume of disruptive and other imports, production, utilization of capacity, productivity, and investments. Such damage must be caused by a sharp, substantial increase of particular products from particular sources which are offered at prices substantially below those prevailing in the importing country.

[9] The annual growth rate applies to overall levels of imports from a particular supplier country. Higher or lower growth rates can apply to particular products, as long as the overall growth rate with respect to that supplier country is 6 percent.

[10] T.I.A.S. 8939 (1977).

[11] T.I.A.S. 10323 (1981).

The terms of each bilateral agreement are worked out through negotiation. The life of an agreement ranges from 3 to 6 years. Each agreement contains flexible, specific, and/or aggregate limits with respect to the type and volume of textile products that the supplier country can export to the United States. Limits are set in terms of square yard equivalents (SYE's). The MFA allows, under certain conditions, for carryover (from the prior year to current year within the same product category), carryforward (from the subsequent year to the current year within the same product category), and swing (from one product category to another product category within the same year) of unused portions of quotas. These provisions may be applied only with respect to specific import limits set forth in the bilateral agreement. Each agreement also provides for adjustment of import levels in accordance with specified growth rates. Some of the bilaterals provide for an export control system to be administered by the exporting country to assure compliance with the terms of the agreement.

Consultation levels apply to categories which do not have specific limits. Once imports in a particular category reach the consultation level, the U.S. Government requests or "calls" for consultations to control imports in that product category. If consultations fail to produce an agreement on restrictive levels, and the United States is able to demonstrate that such imports are causing market disruption, then the United States may take unilateral action, such as an embargo, to restrict further imports in that product category.

The Committee for Implementation of Textile Agreements (CITA) is responsible for administering the bilateral textile agreements program.[12] CITA is composed of representatives from the Departments of Commerce, State, Labor, and Treasury, and the Office of the U.S. Trade Representative. The Commerce Department official is chair of the committee, and heads the Office of Textiles and Apparel (OTEXA) in the Department of Commerce which implements the terms of the agreement and decisions made by CITA. A primary function of CITA is to monitor imports and to determine when calls for consultations are to be made.

Fees and Quotas Under Section 22 of the Agricultural Adjustment Act of 1933

Section 22 of the Agricultural Adjustment Act of 1933, as amended,[13] authorizes the President to impose fees or quotas on imported products that undermine any U.S. Department of Agriculture (USDA) domestic commodity program. This authority, which has existed in some form since 1935,[14] is designed to prevent imports from interfering with USDA efforts to stabilize or raise domestic agricultural commodity prices.

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[12] Exec. Order 11651, 3 CFR 676 (1971-75 Comp.).

[13] Act of May 12, 1933, ch. 25, title I, 48 Stat. 31, as amended by Public Law 74-320, section 31, 49 Stat. 773, 7 U.S.C. 624.

[14] Section 22 was added by section 31 of the Act of August 24, 1935, Public Law 74-320, 49 Stat. 773.

The protection of farm income has long been considered essential to assure the Nation balanced and adequate supplies of food and fiber. A fundamental element of U.S. agricultural policy, therefore, has been the stabilization and support of farm prices. The Congress has mandated minimum support prices for some of the major storage farm commodities; discretionary support authority exists for other commodities; and in other cases, particularly for perishable products, growers are authorized to regulate marketing in their product sectors.

When world commodity prices are lower than domestic support prices, imports may enter the U.S. market in increasing quantities, and undercut domestic support prices. Consequently, either the USDA must remove larger quantities from the market or farmers must make sharper cuts in production. The negative effect that imports can have on the USDA's commodity price support programs provided the basis for enactment of import control authority in 1935. Section 31 of the Act of August 24, 1935 added section 22 to the Agricultural Adjustment Act of 1933. Since its enactment in 1935, section 22 has been amended numerous times, the last time by the Act of August 7, 1953.

BASIC PROVISIONS

Under section 22, the Secretary of Agriculture is directed to advise the President when the Secretary has reason to believe that imports of any article "render or tend to render ineffective, or materially interfere with" any USDA price support or similar agricultural program, or "reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof" which is the subject of an agricultural program. Such determination is usually based on USDA activities in monitoring imports, although private parties can request the Secretary to take action pursuant to this section.

If the President agrees that there is reason for such belief, he must order an investigation of the situation by the International Trade Commission (ITC). The ITC must give precedence to such investigation, and report its findings along with recommendations for action to the President.

Based on the ITC report, the President must determine whether the conditions specified in the statute exist. If the President makes an affirmative determination, he is required to impose, by proclamation, either import fees or import quotas sufficient to prevent imports of that product from harming or interfering with the relevant price support program. Any import fee imposed, however, may not exceed 50 percent ad valorem. Any import quota imposed may not exceed 50 percent of the quantity imported during a representative period, as determined by the President. These ceilings are statutorily set, and may not be exceeded even if, after imposition of fees or quotas, imports continue to enter the United States in such quantities as to interfere with any agricultural program. In designating the articles subject to such a fee or quota, the President may describe them by physical qualities, value, use, or any other basis.

If the Secretary of Agriculture determines and reports to the President that emergency action is needed, the President may take immediate interim action without awaiting a report by the ITC. Such interim action will continue in effect until the President acts on the ITC report.

Any decision of the President as to facts under section 22 is final. The President may modify, suspend, or terminate any fees or quotas imposed after an ITC investigation and report and a Presidential determination that changed circumstances require modification, suspension or termination.

RELATIONSHIP TO INTERNATIONAL AGREEMENTS AND OTHER LAWS

The provisions of section 22 supercede any inconsistent provisions of international agreements entered into by the United States.[15] The use of section 22 quotas is inconsistent with Articles II and XI of the GATT. Article II prohibits unequal treatment of trading partners, and Article XI forbids the use of quantitative import restrictions. To remedy the inconsistency between section 22 and the GATT, the United States sought and received a waiver of the provisions of Articles II and XI in 1955.[16]

Fees and quotas established under section 22 are not affected by duty-free status granted under the Generalized System of Preferences or the Caribbean Basin Initiative. There are no provisions under section 22 for exclusion or preference of products from specific countries. Quotas imposed under the section, however, are usually allocated among supplying countries in accordance with each country's proportionate market share during a previous representative period.

APPLICATION

Since its enactment in 1935, section 22 has been used to impose import controls on 12 different commodities or groups of commodities: (1) wheat and wheat flour; (2) rye, rye flour, and rye meal; (3) barley, hulled or unhulled, including rolled, ground, and barley malt; (4) oats, hulled or unhulled, and unhulled ground oats; (5) cotton, certain cotton wastes, and cotton products; (6) certain dairy products; (7) shelled almonds; (8) shelled filberts; (9) peanuts and peanut oil; (10) tung nuts and tung oil; (11) flaxseed and linseed oil; and (12) sugars and sirups. Section 22 fees and quotas have since been terminated for most of these commodities. At the current time, however, import controls are in place to protect cotton, certain dairy products, peanuts, and sugar. The fees and quotas applicable to imported products under section 22 are specified in part 3 of the Appendix to the Tariff Schedules of the United States.

Sugar Quotas Under Headnote Authorities

Headnote 2 of Part 10A of Schedule 1 of the Tariff Schedules of the United States (TSUS) provides the President with authority to establish an annual quota for imports of sugars, syrups and molasses described in TSUS Items 155.20 and 155.30.[17] Headnote 2 was added to the TSUS in 1967 [18] to carry out a provision in the Geneva (1967) Protocol of the General Agreement on Tariffs and Trade containing the results of the Kennedy Round of Multilateral Trade Negotiations.[19]

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[15] 7 U.S.C. 624(f).

[16] Decision of 5 March 1955 as reported in the Basic Instruments and Selected Documents, Third Supplement, General Agreement on Tariffs and Trade, Geneva, June 1955.

Background

The United States has historically imported between 33 and 55 percent of its sugar needs, making it one of the world's largest sugar importers. At the same time, it has been this nation's policy to maintain its own sugar industry, even when world prices are substantially below production costs in the United States. A quota on sugar imports (including syrups and molasses) has been a common characteristic of U.S. sugar policy since 1934.

Sugar quota authority was first contained in sugar price support legislation in 1934. The Jones-Costigan Act of 1934 [20] imposed a quota on sugar imports partly in response to the failure of high tariffs to solve the domestic sugar problem. The Sugar Act of 1937 [21] renewed and revised the sugar program and this legislation continued to be extended until being replaced by the Sugar Act of 1948.[22] The 1948 legislation was amended and repeatedly extended until, failing renewal, it expired in 1973.

Authority to impose and to modify sugar quotas was classified in the TSUS under headnote 2 in 1967.

Application

The authority under headnote 2 was used to impose a restrictive quota on sugar imports by President Reagan on May 5, 1982.[23] The quota is allocated on a country-by-country basis among supplying countries in accordance with their historic shares of the U.S. market [24] and in accordance with the provisions of the International Sugar Agreement.[25] In order to facilitate the orderly imposition of sugar during the quota year, a certificate of eligibility system has been established which permits sugar from participating countries to enter the United States only if such imports are accompanied by certificates of eligibility.[26]

The quota for fiscal year 1984 is set at 2.952 million tons and is allocated among supplying countries as shown below. Additional allowances are made for small suppliers and specialty sugars which raise the import limit to 3.075 million tons.

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[17] Sugar imported for refining and reexportation, or for use in the production of polyhydric alcohols, is exempt from the quota. Pres. Proc. 5002, Nov. 30, 1982, 47 Fed. Reg. 54269, 48 Fed. Reg. 29824.

[18] Pres. Proc. 3822, Dec. 16, 1967, 82 Stat. 1455.

[19] Note 1 of Unit A, Chapter 10, Part 1 of Schedule XX; 19 U.S.T., Part II, 1282.

[20] Public Law 73-213, ch. 263, approved May 9, 1934, 7 U.S.C. 608-620.

[21] Public Law 75-414, ch. 898, approved September 1, 1937, 7 U.S.C. 1100-1137.

[22] Public Law 80-388, ch. 519, approved August 8, 1948, 7 U.S.C. 1100-1160.

[23] Pres. Proc. 4941, May 5, 1982, 47 Fed. Reg. 34777.

[24] The allocation is determined by taking the average of each country's sugar exports to the United States between 1975 and 1981, subtracting the highest and lowest levels, and computing this as a percent of the total quota.

[25] See discussion of International Sugar Agreement, infra.

[26] See Pres. Proc. 4941, May 5, 1982, 47 Fed. Reg. 34777.

Country sugar quota allocations, fiscal year 1984

Country	*Percentage*
Dominican Republic	17.6
Brazil	14.5
Philippines	13.5
Australia	8.3
Guatemala	4.8
Argentina	4.3
Peru	4.1
El Salvador	3.0
Panama	2.9
Colombia	2.4
Republic of South Africa	2.3
Costa Rica	2.1
Honduras	2.1
Swaziland	1.6
Thailand	1.4
Mozambique	1.3
Guyana	1.2
Taiwan	1.2
Belize	1.1
Canada	1.1
Ecuador	1.1
Jamaica	1.1
Mauritius	1.1
Other specified countries and areas	5.9
Total	100.0

Source: Headnote 3 of Part 10A of Schedule 1, TSUS, with adjustments to account for a May 10, 1983 reduction in the Nicaraguan quota that was reallocated to Honduras, Costa Rica, and El Salvador.

Meat Import Act of 1979

The Meat Import Act of 1979 [27] requires the President to impose quotas on imports of beef, veal, mutton, and goat meat when the aggregate quantity of such imports on an annual basis is expected to exceed a prescribed trigger level. The predecessor statute of the Meat Import Act of 1979 was the Meat Import Act of 1964,[28] which provided similar authority to the President to impose quotas on meat imports, based on a different formula.

Background

In 1964, the U.S. cattle industry was facing depressed economic conditions, and sought relief from increasing import competition. The Johnson Administration that year negotiated voluntary restraint agreements with Australia, New Zealand, Ireland and Mexico with respect to their exports of meat to the United States. Pressure for import quotas continued, however, and during the summer of 1964, the Meat Import Act of 1964 was passed by Congress and signed by President Johnson.

The Meat Import Act of 1964 required the President to impose quotas on imports of meat from cattle, goats and sheep whenever the Secretary of Agriculture determined that, without quotas, imports would equal or exceed a specified trigger level. The trigger was based on the average annual level of meat imports between 1959 and 1963, plus 10 percent, adjusted upward by the percentage increase, or downward by the percentage decrease, in domestic commercial production of these meats since the 1959–63 period. The President could suspend or raise the quotas, however, for overriding economic or national security interests, or for reasons of inadequate domestic supply.

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[27] Public Law 96-177, approved December 31, 1979, 93 Stat. 1291, 19 U.S.C. 1202.

[28] Public Law 88-482, approved August 22, 1964.

The provisions of the 1964 law were expected to help raise domestic meat prices and thus help revive the domestic cattle industry. In the years following enactment, however, domestic cattle prices remained low.[29] Moreover, until 1976 no quotas were imposed on meat imports. During many years the level of expected meat imports for that year fell below the trigger level. During other years, the Federal Government either negotiated voluntary restraint agreements with foreign suppliers, or suspended the required quotas simultaneously with their proclamation due to "overriding economic interests." In October of 1976 a quota was imposed on meat from Canada, but the quota was terminated at the end of that same year.

By the late 1970's, U.S. livestock producers had stepped up efforts to strengthen the 1964 law. These efforts culminated in the passage of the Meat Import Act of 1979. Congress passed the Act on December 18, 1979, and December 31, 1979, President Carter signed it into law.

Basic provisions

The Meat Import Act of 1979 requires the President to impose a quota on imports of beef, veal, mutton, and goat meat [30] when the aggregate quantity of such imports is expected to exceed a prescribed countercyclical adjusted based quantity by 10 percent or more, on an annual basis. The trigger level, setting off quotas, is thus 110 percent of the adjusted base quantity. The statute sets the base quantity at 1,204,600,000 pounds, to be adjusted by a countercyclical formula which allows more imports when domestic supplies are low, and less imports when domestic supplies are abundant. The formula multiplies the base quantity by the ratio of average annual per capita production of domestic cow beef during the current and the previous four calendar years to average annual per capita production of domestic cow beef in the current and immediately preceding calendar year.

The Secretary of Agriculture is responsible for making annual estimates, to be revised on a quarterly basis, of the countercyclical adjusted base quantity and of expected meat imports. When expected annual imports reach the trigger level, the President is required to impose a quota set at 110 percent of the countercyclical adjusted base quantity. The statute further provides, however, for a minimum access floor of 1.25 billion pounds annually, so that import quotas may never be less than 1.25 billion pounds.

Any quota imposed must be allocated among supplying countries on the basis of their historic shares of the U.S. market, and would cover all articles included in the calculation of the countercyclical adjusted based quantity.

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[29] By the early 1970's farm prices for beef improved for a short time, but profits were again depressed after 1973 by overexpansion, rising production costs, and a decline in domestic consumption.

[30] Classified under TSUS Items 106.10, 106.22, 106.25, 107.55, and 107.62.

A quota imposed under this Act may be suspended or raised by the President if, after giving notice and providing opportunity for comment, he determines one of the following:

(1) suspension or increase is required by overriding economic or national security interests of the United States;

(2) domestic supply of such meat will be inadequate to meet domestic demand at reasonable prices; or

(3) trade agreements entered into force after date of enactment ensure that policy set forth will be carried out.

Additional conditions must be met prior to suspension or increase if the cattle cycle at that time is in the herd liquidation phase and domestic beef production is relatively high.

Application

No quota has yet been imposed under the Meat Import Act of 1979. In 1980 and 1981 imports remained under the trigger level. In 1982 and 1983 imports threatened to exceed the annual triggers of 1.3 billion and 1.231 billion pounds respectively, however, voluntary restraint agreements were negotiated limiting imports from Australia, New Zealand and Canada thereby avoiding imposition of quotas. Meat imports in 1984 are not expected to reach the 1984 trigger level of 1.228 billion pounds.

International Commodity Agreements

International commodity agreements are multilateral agreements signed by producing and consuming countries, the purpose of which is to stabilize price and supply of an internationally traded primary commodity (agricultural or mineral) and closely related products. These agreements are generally entered into due to the extreme price fluctuations characterizing trade in certain commodities, as a result of periodic adverse weather conditions, economic cycles, or other causes. The agreements generally include provisions on buffer stocks, export-import controls, price setting, and long term contracts. A central organization administers the agreement for its members. The United States is currently a party to three international agreements, covering coffee, sugar and rubber.[31]

INTERNATIONAL COFFEE AGREEMENT

Representatives of the U.S. Government signed the fourth International Coffee Agreement (ICA) on March 23, 1983. This agreement, which entered into force provisionally on October 1, 1983, was the fourth in a series of coffee agreements and will run for 6 years, until 1989. Earlier agreements had been negotiated in 1962, 1968, and in 1976. The 1983 agreement was signed by 73 countries representing 95 percent of the exporting nations and 90 percent of the importing nations by volume of trade. The Senate unanimously ratified this treaty in July 1983[32] and in September 1983 Congress passed implementing legislation.[33]

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[31] The United States was a party to the Fifth International Tin Agreement. On June 30, 1982, however, the Fifth International Tin Agreement expired, and as of December 1, 1984, the United States had not signed the Sixth International Tin Agreement, which went into effect on July 1, 1982.

The objective of the ICA is to stabilize the price of coffee within a range that is acceptable to both consumers and producers. The method used to stabilize these prices is a system of country export quotas which are decreased when prices are declining and increased when prices are within an agreed range. In periods of high prices, quotas are suspended altogether in order to encourage maximum exports. The quota system is enforced by the importing members. The Agreement itself contains no fixed price objective; rather, each year the members of the Agreement establish a price range based on current production and consumption trends, inventory levels, and other factors that influence the market.

The negotiated price range for 1983/1984 was established at $1.15 to $1.45 per pound.

The countries with the largest production and export quotas are Brazil, Colombia, and the Ivory Coast. All three, and the other 17 coffee-exporting members, are dependent on coffee exports for earnings of foreign exchange. Therefore, all of these countries have a keen interest in the determination of quotas and price ranges.

Consuming nations now have the opportunity to approve the final export quota distribution among the producing countries. Such approval allows the consuming nations to have a voice in insuring that world supply is maintained and that stocking levels in exporting countries are kept. Since the United States is such a large consumer, these changes allow the United States to have a more prominent role in the decisionmaking process within the ICA structure.

The 1983 ICA also addressed certain concerns about violations of the export quota system when member countries sell coffee to nonmember countries, who in turn sell the coffee on the world market, driving down the price. The 1983 ICA strengthened the control system which monitors the flow of coffee from members to nonmembers, so that large sales by nonmember countries cannot be made to importing member countries in violation of the ICA quota system.

The administration of the ICA is managed by a London-based body known as the International Coffee Organization (ICO). Policy, however, is set by a Member Council. Votes on this Council are weighted, based on the member's participation in world trade. Decisions on policy must be passed by a two-thirds weighted vote of the members. The United States, with an import share of 30 percent, has an important voice in the decisions of the Council.

The International Coffee Agreement Act of 1983 only provides implementing authority for 3 years, even though the life of the 1983 ICA is 6 years. In 1986 Congress must review the agreement and consider providing further implementing authority through 1989.

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[32] The Senate unanimously ratified the Agreement on July 27, 1983 (Treaty Doc. 98-2). The Committee on Foreign Relations published Executive Report No. 98-11 to accompany the treaty on June 29, 1983.

[33] The International Coffee Agreement Act of 1983, Public Law 98-120, approved October 12, 1983. See also H. Rept. No. 98-376 to accompany H.R. 3813, and S. Rept. No. 98-250 to accompany S. 1847.

INTERNATIONAL SUGAR AGREEMENT

The 1977 International Sugar Agreement (ISA)[34] was the fifth in a series of international sugar agreements. The United States had participated as a sugar producing and importing nation in negotiations for sugar agreements in 1953, 1958, 1968, and 1973.

The Senate ratified the 1977 International Sugar Agreement on November 30, 1979. Ratification of this treaty took almost 3 years due to conflict among competing sugar interests. A bill to ratify the ISA was used as a vehicle for a new domestic sugar price support program and defeated in the Senate in October 1979, in light of opposition by the Carter administration. The treaty was finally ratified and went forward without implementing legislation after Congress got administration commitments to use import fees and duties to maintain a market objective or a minimum price for domestic sugar of 15.8 cents a pound.

Implementing legislation for the 1977 ISA passed Congress in the spring of 1980.[35] It authorized the President to restrict imports from non-ISA member nations and required the executive branch to keep records and reports concerning the entry of sugar into the United States. It also authorized the President to refuse entry of sugar into the United States unless accompanied by certification from the ISA that a required fee had been paid (by either the buyer or the seller) to the ISO.[36] The law further directs the President to withdraw from the ISA if he determines that there is evidence of collusion among producing-member nations causing an unwarranted increase in sugar prices. U.S. participation in the 1977 International Sugar Agreement was extended in 1983 for 2 additional years until January 1, 1985, at which time the treaty expires.[37]

The purpose of the 1977 ISA is to stabilize world prices for sugar within an agreed range which would ensure adequate returns to producers, ample supplies for consumers, and avoid excessive price fluctuations on world markets. The price range was set in 1978 at 11 to 21 cents per pound, and was increased in 1982 to 13 to 23 cents per pound. An administrative secretariat in London, the International Sugar Organization (ISO) closely monitors world prices, supports buffer stock formation in producing countries, and issues ISA stamps to member exporting countries for specified amounts or quotas of sugar. These amounts, known as Basic Export Tonnages (BETs), specify the volume of sugar a member exporter can release for sale on the world market.

Two of the world's largest exporters, the European Community and Cuba, are not members of the ISA, and therefore the amount of sugar these countries place for sale in world markets is not subject to ISA discipline. ISA member countries control less than 20 percent of the world's sugar trade. In light of its limited coverage, the ISA has been criticized for not being an effective means of stabilizing world sugar prices and supplies.

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[34] T.I.A.S. 9664, 31 U.S.T. 5135, done at Geneva, October 7, 1977.

[35] Public Law 96-236, approved April 22, 1980, 94 Stat. 336-7, 7 U.S.C. 3602.

[36] Fees support a central fund in the ISA to defray administrative expenses and costs for members stockpiling sugar.

[37] Public Law 97-466, sec. 153, approved January 12, 1983, 96 Stat. 2329, 7 U.S.C. 3602.

The 1977 International Sugar Agreement will expire on January 1, 1985. During 1984, the member nations met to try to negotiate a new International Sugar Agreement, but were unsuccessful in reaching agreement on market-regulating provisions. As a result, a more limited agreement was concluded, providing only for research and publication of data. The United States signed the new International Sugar Agreement in November 1984, to become effective January 1, 1985. Further negotiations among ISA member nations will continue to seek agreement on a longer term agreement providing for regulation of international trade in sugar.

INTERNATIONAL NATURAL RUBBER AGREEMENT

The Senate ratified the International Natural Rubber Agreement of 1979 (INRA)[38] on May 22, 1980. The agreement entered into force provisionally on October 23, 1980, and definitively on October 15, 1982.

The main objectives of the INRA are to stabilize natural rubber prices without disturbing long-term market trends and to seek expanding natural rubber supplies for importing members at reasonable prices. The principal feature of the agreement is the establishment of a 550,000 metric ton buffer stock, to be used to stabilize prices within a designated price range. The price range consists of an adjustable reference price with a stablization band around it, from 15 percent above to 15 percent below the reference price. The reference price was initially set at 45 cents per pound, and is subject to periodic review and revision in accordance with market conditions.

The INRA further provides for upper and lower indicative prices of 32 cents per pound and 58 cents per pound which act as floor and ceiling prices beyond which the reference price and price stabilization bands may not be adjusted. This provision is designated to provide protection to both consumer and producer nations against excessive shifts in the price stabilization band.

The agreement also contains provisions designated to promote expansion of natural rubber supplies. Producing members have agreed to undertake policies and programs which ensure continuous availability of natural rubber supplies. The International Natural Rubber Council, which administers the agreement, is responsible for identifying and proposing measures which will expand and improve natural rubber production, productivity and marketing.

Steel Import Stabilization Act

Title VIII of the Trade and Tariff Act of 1984, sets forth the provisions of the Steel Import Stabilization Act,[39] which grants the President authority to enforce the terms of bilateral arrangements limiting the export of steel products to the United States. Congress provided this authority in October 1984 in response to President

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[38] T.I.A.S. 10379, done at Geneva, October 6, 1979.

[39] Public Law 98-573, title VIII, approved October 30, 1984.

Reagan's decision the previous month to reject a petition for import relief to the domestic steel industry under section 201 of the Trade Act of 1974, and instead to enter into a series of bilateral restraint agreements with steel-exporting nations to reduce their exports of steel to the United States.[40]

Background

In January 1984, Bethlehem Steel Corporation and the United Steelworkers of America jointly filed a petition under section 201 of the Trade Act of 1974 for import relief in the form of global quotas on imports of carbon and alloy steel products. In July 1984, in response to this petition, the International Trade Commission (ITC) submitted a report to the President setting forth its findings of serious injury and recommendations of quotas for five out of nine steel product categories.[41] On September 18, 1984 President Reagan announced his decision to deny import relief under section 203 of the Trade Act of 1974, and, instead, to negotiate bilateral restraints with steel-exporting countries to limit U.S. imports of steel, and to pursue a more vigorous policy of enforcement of the laws against unfair trade practices.[42] Based on the series of actions to be taken as part of the new steel trade policy, it was the expectation of the President that steel imports would be reduced to approximately 18.5 percent of the U.S. market, excluding semi-finished steel.[43]

In response to the President's decision, the following week legislation was introduced in the House of Representatives (H.R. 6301) to provide the President with express authority to enforce such bilateral restraint agreements, conditioned on adequate performance by the domestic steel industry in modernizing its plants and providing retraining to its former workers.[44] The Steel Import Stabilization Act, H.R. 6301, was reported favorably by the Committee on Ways and Means on September 27,[45] and passed by the House of Representatives on October 2, 1984. The House then passed H.R. 6301 as an amendment to an omnibus trade bill, H.R. 3398, and it was considered in the House-Senate conference on H.R. 3398. Title VIII of the Trade and Tariff Act of 1984 contains the provisions of the Steel Import Stabilization Act as agreed to by the conference. The provisions of title VIII took effect as of October 1, 1984.

Basic provisions

The Steel Import Stabilization Act provides the President, for up to five years, with authority to enforce the quantitative limitations, restrictions, and other terms agreed to in bilateral restraint arrangements between the United States and steel-exporting nations. The enforcement authority is broad in scope, authorizing the President "to carry out such actions as may be necessary or appropriate," including, but not limited to requiring presentation of valid export licenses or other documentation as a condition of entry into the United States. The definition of "bilateral arrangements" provided in the Act is also intentionally broad, and refers to any arrangement, agreement, or understanding (including, but not limited to, any surge control understanding or suspension agreement) between the United States and any foreign country containing quantitative limitations, restrictions, or other terms relating to the importation into, or exportation to, the United States of steel products.

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[40] Exec. Comm. 4046, September 18, 1984 (H. Doc. 98-263).

[41] Report to the President on Investigation No. TA-201-51, USITC Pub. No. 1553, July 1984.

[42] Exec. Comm. 4046, September 18, 1984 (H. Doc. 98-263).

[43] After expected imports of semi-finished steel are factored in, the import market share that was expected by the President's policy equalled 20.2 percent of the U.S. market.

[44] H.R. 6301 was introduced on September 25, 1984 by Congressman Dan Rostenkowski (D-Ill).

[45] House Report 98-1089.

The Act provides the Secretary of Commerce specifically with authority to enforce restrictions on exports to the United States of steel pipes and tubes from the European Communities in accordance with the terms of the U.S.-E.C. Arrangement on Pipes and Tubes. This authority is specifically granted to the Secretary of Commerce in light of the Secretary's current responsibilities for enforcement of the U.S.-E.C. Arrangement on Basic Carbon Steel Products.

The enforcement authority provided by the Act is limited in duration to a maximum of 5 years, and is subject to annual renewal within the 5-year period. In order for the enforcement authority to renew for an additional year, the President must submit in writing prior to the anniversary date an affirmative determination to the House Committee on Ways and Means and Senate Committee on Finance that certain requirements set forth in the Act have been met. These requirements include the following:

> (1) that the major steel companies, taken as a whole, have, during the relevant 12-month period, (a) committed substantially all of their net cash flow from steel operations for purposes of reinvestment in and modernization of their steel operations; and (b) taken sufficient action to maintain their international competitiveness;
>
> (2) that each of the major steel companies committed, during the relevant 12-month period, not less than 1 percent of net cash flow to the retraining of workers, unless the President waives this requirement with respect to a particular company due to unusual economic circumstances; and
>
> (3) that the enforcement authority remains necessary to maintain the effectiveness of bilateral arrangements undertaken to eliminate unfair trade practices in the steel sector.

If the President does not submit an affirmative determination that these conditions have been met, the enforcement authority permanently expires. If the President does submit such an affirmative determination, the enforcement authority renews for an additional year, at which time it would again be subject to the annual determination requirement. This process of annual renewal will continue until the authority is terminated, or until the authority has been in effect for 5 years, whichever is sooner.

The Act also requires the Secretary of Labor to prepare, in consultation with the Steel Advisory Committee, and to submit to Congress by April 1, 1985, a proposed plan of action for assisting workers in communities that are adversely affected by imports of steel products. Such assistance must include retraining and relocation for former workers in the steel industry who are unlikely to return to work in the industry.

National Security Import Restrictions: Section 232 of the Trade Expansion Act of 1962

Section 232 of the Trade Expansion Act of 1962 [46] as amended by section 127 of the Trade Act of 1974 [47] and the Reorganization Plan of 1979 [48] authorizes the President to impose restrictions on imports which threaten to impair the national security. This authority has been used by the President to impose quotas and fees on imports of petroleum and petroleum products from time to time. Public Law 96-223 (imposing a windfall profit tax on domestic crude oil) amended section 232 to authorize either House of Congress to disapprove an action of the President to adjust oil imports.

Section 232 as amended requires the Secretary of Commerce to conduct immediately an investigation to determine the effects on national security of imports of an article, upon the request of any U.S. Government department or agency, application of an interested party, or upon his own motion. The Secretary must report the findings of his investigation and his recommendations for action or inaction to the President within one year after receiving the application or beginning the investigation. If the Secretary finds the article "is being imported in such quantities or under such circumstances as to threaten to impair the national security," he must so advise the President. Unless the President reverses this finding, he must take such action for such time as he deems necessary to "adjust" the imports of the article and its derivatives so imports will not threaten to impair the national security. The President must report to the Congress within 60 days the action taken and the reasons therefor.

The Secretary must hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation if it is appropriate and after reasonable notice. The Secretary must also seek information and advice from, and consult with, other appropriate agencies. Among the factors which the Secretary and the President must consider are domestic production needs for projected national defense requirements; domestic industry capacity to meet these requirements; existing and anticipated availability of resources, supplies, and services essential to the national defense; the growth requirements of such industries, supplies, services; imports in terms of their quantities, availability, character, and use as they affect such industries and U.S. capacity to meet national security requirements; the impact of foreign competition on the economic welfare of domestic industries; and any substantial unemployment, revenue declines, loss of skills or investment, or other serious effects resulting from displacement of any domestic products by excessive imports.

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[46] Public Law 87-794, approved October 11, 1962, 19 U.S.C. 1351.

[47] Public Law 93-618, sec. 127, approved January 3, 1975, 19 U.S.C. 1862-1863.

[48] Reorganization Plan No. 3 of 1979, Exec. Order No. 12188, January 4, 1980, 44 Fed. Reg. 69273.

Balance of Payments Authority: Section 122 of the Trade Act of 1974

Section 122 of the Trade Act of 1974[49] provides the President with authority either to increase or reduce restrictions on imports into the United States to deal with balance of payments problems.

Tighter restrictions in the form of an import surcharge (not to exceed 15 percent ad valorem), temporary quota, or a combination of the two may be imposed for up to 150 days (unless extended by act of Congress) whenever fundamental international payments problems make such restrictions necessary to deal with large and serious U.S. balance of payments deficits, to prevent an imminent and significant depreciation of the dollar, or to cooperate with other countries in correcting an international balance of payments disequilibrium.

Existing import restrictions may be eased for a period of up to 150 days (unless extended by act of Congress) through a temporary reduction in the rate of duty on any article (not to exceed 5 percent ad valorem), a temporary increase in the value or quantity of imports subject to any type of import restriction, or a temporary suspension of any import restriction. Such restrictions may be eased whenever fundamental international payments problems require special measures to deal with large and serious balance of payments surpluses or to prevent significant appreciation of the dollar. Trade liberalizing measures must be broad and uniform as to articles covered. The President may not, however, liberalize imports of those products for which increased imports will cause or contribute to material injury to domestic firms or workers, impairment of national security, or otherwise be contrary to the national interest.

Certain conditions also are placed on the President's use of import restrictions for balance of payments purposes. Quotas may be imposed only if international agreements to which the United States is a party permit them as a balance of payments measure and only to the extent that the imbalance cannot be dealt with through an import surcharge. If the President determines that import restrictions are contrary to the national interest, he may refrain from imposing them but must inform and consult with Congress.

Section 122(d) requires that import restrictions be applied on a nondiscriminatory basis; it also requires that quotas aim to distribute foreign trade with the United States in a manner that reflects existing trade patterns. If the President finds, however, that the purposes of the provision would best be served by action against one or more countries with large and persistent balance of payment surpluses, he may exempt all other countries from such action. This section also expresses the sense of Congress that the President seek modifications in international agreements to allow the use of surcharges instead of quotas for balance of payments adjustment purposes. If such international reforms are achieved, the President's authority to exempt all but one or two surplus countries from import restrictions must be applied in a manner consistent with the new international rules.

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[49] Public Law sec. 122, approved January 3, 1975, 19 U.S.C. 2132.

Section 122(e) provides that import restrictions be of broad and uniform application as to product coverage, unless U.S. economic needs dictate otherwise. Exceptions under this section are limited to the unavailability of domestic supply at reasonable prices, the necessary importation of raw materials and similar factors, or if uniform restrictions will be unnecessary or ineffective (i.e., if products already are subject to import restrictions, are in transit, or are subject to binding contracts). The section prohibits the use of balance of payments authority or the exceptions authority to protect domestic industries from import competition. Any quantitative restriction imposed may not be more restrictive than the level of imports entered during the most recent representative period, and must take into account any increase in domestic consumption since the most recent representative period.

The President is authorized to modify, suspend, or terminate any proclamation issued under the section, either during the initial 150-day period or during any subsequent extension by act of Congress.

Background

Anticipating that oil-consuming nations would face large balance of payments deficits in an era of rapidly increasing oil prices, and believing that neither a reduction in the price of oil nor the necessary international monetary cooperation were certain to take place, Congress considered it necessary to authorize the President to impose surcharges or other import restrictions for balance of payments purposes, even though Congress assumed that under existing circumstances such authority was not likely to be used.[50] The Senate Committee on Finance indicated it was necessary to give the President explicit authority to impose such measures for balance of payments reasons, in light of judicial action striking down the use of the Trading with the Enemy Act for such purposes.[51] President Nixon had invoked that law in 1971 when he imposed a temporary 10 percent import surcharge to redress a balance of payments deficit.

The use of surcharges for balance of payments purposes had gained de facto acceptance among industrialized GATT nations during the two decades preceding the 1974 Trade Act, but explicit GATT rules had never been adopted. GATT Article XII authorizes restrictions on the quantity or value of goods imported by a country facing a balance-of-payments deficit. GATT rules do not, however, explicitly sanction the use of surcharges for balance-of-payments purposes, nor do they establish a means to deal with countries running persistent balance-of-payments surpluses. The Texts Concerning a Framework for the Conduct of World Trade,[52] negotiated during the Tokyo Round of Multilateral Trade Negotiations, elaborated on the rules which apply to countries' use of import restrictions for balance-of-payments purposes. The so-called Framework Agreement did not fundamentally alter GATT rules in this area, however.

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[50] Senate Report 93-1298 at 87-88.

[51] The decision of the Customs Court was subsequently reversed on appeal. *U.S.* v. *Yoshida International, Inc.*, 526 F.2d 560 (C.C.P.A. 1975).

[52] MTN/FR/W/20/Rev. 2, reprinted in House Doc. No. 96-153, pt. I, at 619.

When it passed the Trade Act of 1974, Congress urged the President to enter into negotiations to develop new rules and required that U.S. surcharges measures, if imposed, conform to any new international standards.[53]

Section 122 authority has never been invoked.

Product Standards

U.S. policy regarding the application of standards and certification procedures to imported products is based on the multilateral Agreement on Technical Barriers to Trade under the General Agreement on Tariffs and Trade (GATT), and its U.S. implementing legislation under title IV of the Trade Agreements Act of 1979.[54]

Differences in product standards, listing and approval procedures, and certification systems often can impede trade and can be manipulated to discriminate against imports. Imports may be tested to determine whether they conform with domestic standards under conditions more onerous than those applicable to domestic products. Certification systems, which indicate whether products conform to standards, may limit access for imports or may discriminate by denying the right of a certification mark on imported products. Prior to the 1979 Agreement, however, there was virtually no multilateral cooperation or supervision to promote international harmonization and to discourage nationalistic discriminatory practices.

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

The Agreement on Technical Barriers to Trade,[55] commonly referred to as the Standards Code, was one of the agreements on nontariff measures concluded during the 1973–79 Tokyo Round of GATT Multilateral Trade Negotiations. The Code went into force on January 1, 1980. The Code does not attempt to create standards for individual products, or to set up specific testing and certification systems. Rather, it establishes, for the first time, international rules among governments regulating the procedures by which standards and certification systems are prepared, adopted and applied, and by which products are tested for conformity with standards. The Code was a major U.S. negotiating objective during the Tokyo Round, particularly given the formation of a European regional electrical certification system closed to outside suppliers.

The Standards Code seeks to eliminate national product standardization and testing practices and certification procedures as barriers to trade among the signatory countries and to encourage the use of open procedures in the adoption of standards. At the same time, it does not limit the ability of countries to reasonably protect the health, safety, security, environment, or consumer interests of their citizens. Generally, U.S. standards-setting processes have followed these basic norms, whereas other countries' standards-related activities have generally been closed to participation from foreign countries; these signatories are obliged to change their practices in order to comply with Code principles.

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[53] Senate Report 93-1298 at 88.

[54] Public Law 96-39, approved July 26, 1979, 19 U.S.C. 2531-2573.

[55] MTN/NTM/W/192 Rev. 5, reprinted in House Doc. No. 96-153, pt. I, at 211.

The Code's provisions are applicable to all products, both agricultural and industrial. They are not applicable to standards involving services, technical specifications included in government procurement contracts, or standards established by individual companies for their own use. The Code addresses governmental and non-governmental standards, both voluntary and mandatory, developed by central governments, state and local governments, and private sector organizations. Only central governments, however, are directly bound by Code obligations, whereas regional, state, local, and private organizations are subject to a second level of obligation whereby signatories "shall take such reasonable measures as may be available to them" to ensure compliance.

The Code is prospective, applying to new and revised standards-related activities. If a signatory country believes, however, that an existing regulation developed and put into effect before the Code came into force conflicts with the basic tenets of the Code, then that signatory may use the Code's dispute settlement mechanism to help resolve the problem.

The Standards Code contains the following key provisions obligating signatories to follow several general principles pertaining to standards-related activities:

(1) The most important and fundamental principle obligates signatory governments not to develop, intentionally or unintentionally, product standards, technical regulations, or certification systems which create unnecessary obstacles to foreign trade. The Code recognizes nations' sovereign right to formulate standards and certification systems to protect life, health and environment, but such regulations should be least disruptive as possible to international trade.

(2) The second fundamental principle is that national or regional certification systems are to grant access to foreign or non-member signatory suppliers under conditions no less favorable than those granted to domestic or member country suppliers, a major change in most signatory policies. Signatories can no longer refuse to give their national certification marks to imported products, provided that the imported products fully meet the technical requirements of the certification system. Also regional certification bodies must be open to suppliers from all Code signatories.

(3) Signatories must provide foreign imported products the same treatment as domestic goods with respect to standards, technical regulations, and testing and certification procedures, i.e., an extension of the national treatment provision of GATT which prohibits discrimination against imported products.

(4) When developing new or revising existing product standards or technical regulations, governments are to use existing or proposed international standards as the basis where it is appropriate. Other signatories may request an explanation if a government fails to follow this principle.

(5) Whenever appropriate, signatories are encouraged to specify technical regulations and standards in terms of performance rather than design or descriptive characteristics.

If a foreign product must be tested to determine whether it meets domestic standards before it can be imported, the Code provides a number of criteria that signatories are to follow to ensure non-discriminatory treatment. For example, foreign goods should not have to undergo costlier or more complex testing than domestic products in comparable situations. In addition, signatories are obligated to use the same methods and administrative procedures on imported as well as domestic goods. The Code does not obligate signatories to recognize test results or certification marks from another country. It does, however, encourage signatories to accept, whenever possible, test results, certifications or marks of conformity from foreign bodies, or self-certification from foreign producers even when the test methods differ from their own, provided that the importing country is satisfied that the exporting country's products meet the required standards.

Another important element of the Standards Code is the obligation of signatories to open up the process of developing or applying standards and certification procedures to each other. Governments must make available proposed mandatory or voluntary standards and certification procedures for comment during the drafting stage by other signatories before they become final regulations. Each signatory government must establish an inquiry point to respond to all reasonable questions from other signatories concerning their central, local, and state government standards and certification procedures.

Finally, the Code establishes a Committee of Signatories which meets periodically to oversee implementation and administration of the agreement, as well as to discuss any new issues or problems which arise. The Committee may set up panels of experts or working parties as required to conduct Committee business or handle disputes.

TITLE IV OF THE TRADE AGREEMENTS ACT OF 1979

Congress approved the Agreement on Technical Barriers to Trade under section 2 of the Trade Agreements Act of 1979. Title IV of that Act implements the obligations of the Standards Code in U.S. law.[56] Since U.S. practices were already in conformity with the Code, title IV did not amend, repeal, or replace any existing law. It does ensure that adequate structures exist within the Federal Government to inform the U.S. private sector about the standards-related activities of other nations, facilitate the ability of the United States to comment on foreign standards-making and certifications, and process domestic complaints on foreign practices.

Section 402 of the 1979 Act requires all Federal agencies to abide by the above-described principles and provisions of the Code. In addition, section 403 states the "sense of Congress" that no State agency and no private person should engage in any standards-related activity, i.e., development or implementation of product standards or certification systems, that creates unnecessary obstacles to foreign trade, and requires the President to "take such reasonable measures as may be available" to promote their observance of Code obligations.

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[56] 19 U.S.C. 2531-2573.

The U.S. Trade Representative (USTR) is designated to coordinate U.S. trade policies related to standards and discussions and negotiations with foreign countries on standards, issues, and to oversee implementation of the Standards Code. The Departments of Agriculture and Commerce are required to work with the USTR on agricultural and non-agricultural issues respectively and to establish technical offices to fulfill a number of functions, particularly supplying notices to interested parties of proposed foreign government standards and receiving and transmitting private sector comments. The Department of Commerce maintains the National Center for Standards and Certification within the National Bureau of Standards as the national inquiry point required under the Code.

Finally, title IV contains provisions concerning administrative and judicial proceedings regarding standards-related activities. No private rights of action are created by title IV; private parties can petition the U.S. Government to invoke provisions of the Code against practices of other signatories.

Government Procurement

U.S. policy on government purchases of foreign goods and services is based on the Buy American Act of 1933,[57] the multilateral Agreement on Government Procurement under the General Agreement on Tariffs and Trade (GATT), and its implementing legislation under title III of the Trade Agreements Act of 1979.[58] In addition, separate provisions in appropriation Acts and other legislation apply more restrictive Buy American-type provisions on particular types of purchases.

Governments are among the world's largest purchasers of nonstrategic goods. Most of this vast market has traditionally been closed to foreign producers by means of formal and informal administrative systems of national discrimination in favor of domestic producers. Although U.S. preferences for domestic suppliers are clearly set out by law and regulation, other countries usually have achieved their discrimination by highly invisible administrative practices and procedures. Government procurement is also excluded from GATT national treatment and most-favored-nation obligations.

BUY AMERICAN ACT

The Buy American Act of 1933, as implemented by Executive Orders 10582 and 11051, requires the U.S. Government to purchase domestic goods and services whenever U.S. sources are of sufficient quality and quantity unless the head of the agency or department involved determines the prices of the domestic supplies are "unreasonable" or their purchase would not be in the U.S. national interest. Executive Order 10582, issued in 1954, states that if the domestic price of a good or service is 6 percent or more above the foreign price, then it is to be considered unreasonable and the foreign product may be purchased. The order also permits agencies to use a differential above 6 percent if it would serve the national interest. The Department of Defense has been using a 50 percent differential since 1962 for its procurement, except on military purchases under memoranda of understanding with NATO countries. The order also indicated that a differential could be applied in cases where a domestic bid generated employment in a labor surplus area as designated by the Secretary of Labor. No specific percentage was stated, but generally a 12 percent differential has been allowed for bids which benefit economically distressed areas.

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[57] Act of March 3, 1933, ch. 212, title III, 47 Stat. 1520, 41 U.S.C. 10a-10d.

[58] Public Law 96-39, title III, approved July 26, 1979, 19 U.S.C. 2511-2518.

AGREEMENT ON GOVERNMENT PROCUREMENT

The Agreement on Government Procurement, also known as the Government Procurement Code,[59] was concluded as one of the agreements on nontariff measures during the 1975–79 Tokyo Round of GATT Multilateral Trade Negotiations (MTN). The Code went into effect on January 1, 1981. A major aim of the United States in the MTN was to develop an international obligation among signatory countries to employ transparent, nondiscriminatory practices at all stages of the procurement process and to open up procurement systems in the high export potential government procurement markets of Europe, Japan, and Canada enabling U.S. firms to compete for foreign government contracts on an equal footing.

The Code is designed to discourage discrimination against foreign suppliers at all stages of the procurement process, from the determination of the characteristic of the product to be purchased to tendering procedures, to contract performance. The Code prescribes specific rules on the drafting of the specifications for goods to be purchased, advertising of prospective purchases, time allocated for the submission of the bids, qualification of suppliers, opening and evaluation of bids, award of contracts, and on hearing and reviewing protests.

Signatories must publish their procurement laws and regulations and make them consistent with the Code rules. Purchasing entities have discretion in their choice of purchasing procedures, provided they provide equitable treatment of all suppliers and allow the maximum degree of competition possible.

Each government agency covered by the Code is required to publish a notice of each proposed purchase in an appropriate publication available to the public, and to provide all suppliers with enough information to permit them to submit responsive tenders. Losing bidders must be informed of all awards and be provided upon request with pertinent information concerning the reasons they were not selected and the name and relative advantages of the winning bidder. Signatories must also provide data on their procurements on an annual basis.

The adoption or use of technical purchase specifications which act to create unnecessary obstacles to international trade is prohibited. The Code mandates the use, where appropriate, of technical specifications based on performance rather than design, and of specifications based on recognized national or international standards.

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[59] MTN/NTM/W/211/Rev. 2, reprinted in House Doc. No. 96-153, pt. I, at 69.

While the Code does not prohibit the granting of an offset or the requirement that technology be licensed as a condition of award, signatories recognize that offsets and requirements for licensing of technology should be limited and used in a nondiscriminatory way.

The Code is largely self-policing. Rules and procedures are structured to help provide solutions to problems between potential suppliers and procuring agencies. As a next step, the Code provides for bilateral consultations between the procuring government and the government of the aggrieved supplier. As a last resort, the Code dispute settlement mechanism under the Committee of Signatories provides for conciliation or establishment of a fact-finding panel.

Coverage of the agreement

The original U.S. negotiating objective had been to include all entities under the direct or substantial control of governments. Most signatory governments were not prepared to agree to this breadth of coverage. Consequently, the Code applies solely to those agencies listed by each signatory in an Annex on contracts valued above 150,000 Special Drawing Rights (about $161,000). In the context of the MTN Agreement on Trade in Civil Aircraft, signatories agreed to eliminate discriminatory practices by all government entities in purchasing aircraft, without a value threshold.

The benefits of the Code are available solely on goods originating in the territory of signatory countries. It does not apply to government services except those incidental to the purchase of goods, construction contracts, purchases excluded on national security grounds, or to purchases by Ministries of Agriculture for farm support programs or human feeding programs such as the U.S. school lunch program. Procurements by state and local governments, including those with Federal funds such as under the Surface Transportation Act, are not subject to the Code.

For the United States, the Code does not apply to the Department of Transportation, the Department of Energy, the Tennessee Valley Authority, the Corps of Engineers of the Department of Defense, the Bureau of Reclamation of the Department of the Interior, and the automated Data and Telecommunications Service of the General Services Administration. In addition, government chartered corporations which are not bound by the Buy American Act, such as the U.S. Postal Service, COMSAT, AMTRAK, and CONRAIL, are not covered.

United States Code coverage also does not apply to set-aside programs reserving purchases for small and minority businesses, prison and blind-made goods, or to the requirements contained in Department of Defense and GSA Appropriations Acts that certain products (i.e., textiles, clothing, shoes, food, stainless steel flatware, certain specialty metals, buses, hand tools, ships, and major ship components) be purchased only from domestic sources.

The Code calls for all signatories, within 3 years after it goes into effect, to undertake further negotiations with a view to improving and expanding Code coverage.

TITLE III OF THE TRADE AGREEMENTS ACT OF 1979

Congress approved the Agreement on Government Procurement under section 2 of the Trade Agreements Act of 1979. Title III of that Act implements the obligations of the Code in U.S. law with respect to purchases by covered Government entities.[60] Since Code provisions reflect many aspects of existing U.S. procurement practice, few changes in domestic law were required.

Executive Order 12260, issued on December 31, 1980, requires all U.S. Government agencies covered by the Code to observe its provisions. Section 301 of the 1979 act authorizes the President to waive the application of discriminatory government procurement law, such as the Buy American Act, and labor surplus set-asides that are not for a small business. The waiver authority applies only to purchases covered by the Code and only to foreign countries designated by the President that meet one of four statutory conditions basically requiring the country to provide appropriate reciprocal, competitive government procurement opportunities to U.S. products and suppliers, unless the country is a least developed country.

Buy American Act preferences still apply to contracts below the 150,000 special drawing rights threshold, purchases by noncovered entities, and procurement from countries not eligible for a waiver regardless of contract size. Special Buy American-type restrictions under other laws (e.g., small business set asides, required domestic sourcing of particular goods) are also not affected.

Section 302 of the 1979 Act is designed to encourage other countries to participate in the Code and provide appropriate reciprocal competitive opportunities. For this purpose, the President is required, after the date on which any waiver first takes effect, to prohibit the procurement of products otherwise covered by the Code from non-designated countries. The President may, however, (1) delay the prohibition for up to two years except with respect to procurements from major industrial countries; (2) authorize agency heads to waive prohibitions on a case-by-case basis when in the national interest; and (3) authorize the Secretary of Defense to waive the prohibition for products of any country which enters into a reciprocal procurement agreement with the Department of Defense. All such waivers are subject to interagency review and general policy guidance.

Section 303 authorized the President to waive as of January 1, 1980 the application of the Buy American Act for purchases by any government entity of civil aircraft and related articles irrespective of value from countries party to the MTN Agreement on Trade in Civil Aircraft.

Section 304 sets forth negotiating objectives in conjunction with the renegotiation of the Code within 3 years to improve its operation and broaden the coverage. The President is directed to seek more open and equitable foreign market access and the harmonization, reduction, or elimination of devices distorting government procurement trade. He must also seek equivalent competitive opportunities in developed countries for U.S. exports in appropriate product sectors as the United States affords their products, such as in the heavy electrical, telecommunications, and transport equipment sectors. The President must report to the committees of jurisdiction during the renegotiations if he determines they are not progressing satisfactorily and are not likely to result within 12 months in expanded agreement coverage of principal developed country purchasers in appropriate product sectors. The President is also directed to indicate appropriate actions to seek sector reciprocity with such countries in government procurement, and may recommend legislation to prohibit procurement by entities not covered by the Code from such countries.

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[60] 19 U.S.C. 2511-2518.

Title III of the 1979 Act also contains a number of reporting requirements to the Congress on various aspects of the Code and its economic impact and implementation.

Chapter 4: LAWS REGULATING EXPORT ACTIVITIES

Foreign Corrupt Practices Act

During the mid-1970's, investigations and administrative and legal actions against numerous domestic corporations revealed the practice of making questionable or illegal payments by U.S. corporations to foreign government officials. The legal and regulatory mechanisms for dealing with such payments had involved actions by the Securities and Exchange Commission (SEC) against public corporations for concealing from required public disclosure substantial payments made by the firm, and the potential for an antitrust action for restraint of trade or fraud prosecution by the Department of Justice.

Government officials and administrators contended that more direct prohibitions on foreign bribery and more detailed requirements concerning corporate recordkeeping and accountability were needed to deal effectively with the problem.

The Foreign Corrupt Practices Act of 1977 [1] was enacted to prevent corporate bribery of foreign officials, and is comprised of three basic provisions:

1. *Books and Records.* Section 102 of the Act amends section 13(b) of the Securities Exchange Act of 1934 [2] to require firms with securities registered with the SEC to keep detailed books, records, and accounts accurately reflecting corporate payments and transactions. This provision would thus prohibit the "disguising" of questionable payments made to persons overseas and would prohibit so-called secret slush funds, that is, "inaccurate books, off-the-book accounts and related practices".

Penalties for violations of the books and records requirements are those penalties applicable generally to violations of other provisions of the Securities Exchange Act. In addition to civil injunctive relief that may be sought by the SEC, criminal penalties of fines up to $10,000 or imprisonment of up to 5 years, or both, may be imposed.

2. *Internal Accounting Controls.* Section 102 further amends section 13(b) of the Securities Exchange Act to require firms with securities registered with the SEC to institute and maintain an adequate internal accounting control system to assure management's control, authority, and responsibility over the firm's assets and "that the assets of the issuer are used for proper corporate purpose". The maintenance of an internal accounting control system is required to attempt to assure that transactions of the firm are executed and access to the firm's assets is permitted only "in accordance with management's general or specific authorization" and to

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[1] Public Law 95-213, title I, approved December 19, 1977, 15 U.S.C. 78a-78ff.

[2] Public Law 73-291, ch. 404, approved June 6, 1934, 15 U.S.C. 77b-78hh.

assure that transactions are recorded and identified in conformance with generally accepted accounting standards. Penalties for violations of this provision are the same as those for the books and records provision.

3. *Criminalization of Foreign Bribery.* Sections 103 and 104 of the Act specifically prohibit domestic firms, whether registered with the SEC or not, from corruptly bribing a foreign official, a foreign political party, party official, or candidate for the purpose of obtaining or maintaining business. Criminal penalties are provided for any firm regulated by the SEC or for any other domestic concern which uses the mails or interstate commerce "corruptly" in furtherance of an offer of payment of money or anything of value to a "foreign official" or to a political party, party official, or candidate for foreign political office for the purpose of influencing such person in his or her decisionmaking or in the use of his or her influence to affect governmental decisions to assist the firm in obtaining or retaining business.

In addition to prohibiting such bribes directly by a firm or by any of its employees, officers, agents, or directors acting on its behalf, the payment of money to any person by a firm when the firm knew or had reason to know that the payment or part of that payment was to be used to bribe a foreign official is also subject to penalty.

Penalties for violations of the bribery provisions of the Act include fines for the firm or corporation of up to $1,000,000, and fines of up to $10,000, or imprisonment of up to 5 years, or both, for individuals who are convicted of violating these provisions. The Attorney General is further authorized to seek injunctive relief against domestic firms or individuals when it appears that they are about to engage in a violation of the bribery provisions.

The recordkeeping and accounting controls provisions of the Act, requiring fair and accurate accounting of corporate transactions and expenditures with respect to payments made overseas, are under the administrative authority of the SEC under the amended provisions of the Securities Exchange Act of 1934. The enforcement of the criminal penalties for corporate "bribery" of foreign officials as proscribed under the Act is under the prosecutorial authority of the Department of Justice.

Domestic International Sales Corporation (DISC) and Foreign Sales Corporation (FSC)

The Domestic International Sales Corporation (DISC) and its successor, the Foreign Sales Corporation (FSC) provide for the tax treatment of U.S. export earnings. The DISC provisions of the Internal Revenue Code were enacted in 1971 as title V of the Revenue Act of 1971.[3] The DISC legislation responded to a perceived need to stimulate U.S. exports in face of steadily declining trade surpluses and to encourage U.S. manufacturers to locate their export-oriented production facilities in the United States rather than overseas. Existing U.S. tax laws were seen as creating an incentive for locating production facilities offshore to serve overseas markets. In addition, other countries were believed to be more generous in their tax treatment of export earnings, and the DISC legislation was considered necessary to put U.S. exporters on an equal footing.

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[3] Public Law 92-178; Internal Revenue Code secs. 991-997.

The DISC tax benefits consist of the deferral of a U.S. firm's Federal income tax liability on a portion of its export earnings. In general, a firm is allowed to allocate a portion of its export income to a specially defined subsidiary, known as a Domestic International Sales Corporation (DISC). The DISC itself is tax-exempt, and the parent firm is taxed at its normal rate on income distributed to it from its DISC. For the parent corporation, therefore, the tax liability on a portion of the income retained by the DISC is deferred until the parent receives it as a distribution. To qualify for tax exemption, a DISC must be incorporated in the District of Columbia or one of the 50 States, satisfy certain gross receipts and gross assets tests relating to the level of export activity, and meet certain other requirements specified in the law.

The DISC provisions were amended in 1974 to enable a financing corporation to qualify as a DISC.[4] The Tax Reduction Act of 1975 [5] denied DISC benefits for the export of natural resources and energy products and for products subject to export control under the Export Control Act of 1969.

Proponents of DISC provisions have argued that DISC benefits provide significant impetus to U.S. exports; opponents argue that DISC's revenue costs have been high and the impact on exports minimal. Partly in response to such criticisms, the size of DISC benefits was curtailed under the Tax Reform Act of 1976 [6] by linking the amount of the benefit to the annual increase in a firm's export income. The 1976 Act also reduced DISC benefits for military goods. The Tax Equity and Fiscal Responsibility Act of 1982 [7] further reduced the size of the tax benefit.

In December 1981, the GATT Council formally adopted four GATT panel reports issued in 1976, finding the DISC and the tax practices of France, Belgium and the Netherlands in violation of GATT rules on the tax treatment of export earnings. In the case of the DISC, the failure to collect interest on the deferred taxes was judged to be an export subsidy. In order to bring U.S. practices into compliance with GATT, the Reagan administration proposed and Congress adopted a revenue-neutral replacement for the DISC in 1984.

The Deficit Reduction Act of 1984 [8] repealed the DISC provisions for all except small businesses, as defined by the Act. The Act instead provides for the establishment of a Foreign Sales Corporation (FSC), and exempts from tax a portion of the export income of a FSC if certain foreign presence and economic process tests are met. In general, in order to qualify for partial tax exemption, a FSC must conduct a specified amount of its economic activities outside the United States, management of the FSC must take place outside the United States, arms-length pricing rules must be adhered to, and other requirements satisfied.

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[4] Public Law 93-482, approved October 26, 1974.
[5] Public Law 94-12, approved March 29, 1975.
[6] Public Law 94-455, approved October 4, 1976.
[7] Public Law 97-248, approved September 3, 1982.
[8] Public Law 98-369, approved July 18, 1984.

The Deficit Reduction Act further provides special rules for small businesses which allow U.S. exporters with relatively small export gross receipts to elect to be either a small DISC or a small FSC. A small DISC may defer income from $10 million or less of export gross receipts, but an interest charge tied to the T-bill rate is imposed on the taxes deferred. FSC benefits are available for up to $5 million of the export gross receipts of a firm that elects to be a small FSC. A small FSC is exempt from the foreign presence and economic process requirements but must meet the other tests established by the Deficit Reduction Act to qualify as a FSC. The 1984 Act forgives all taxes deferred on income accumulated by DISC's in existence on December 31, 1984. The new FSC provisions apply to all transactions after December 31, 1984.

Export Trading Companies

EXPORT TRADING COMPANY ACT OF 1982

The Export Trading Company Act of 1982 (ETC Act)[9] provides for the establishment of an export trading company for the purpose of providing export trade services to U.S. exporting businesses. The basic purpose of the Export Trading Company Act is to stimulate U.S. exports by encouraging and facilitating exporting by small- and medium-sized businesses. Historically, exporting has been conducted by only a fraction of the U.S. business community and generally by large firms. Most small- and medium-sized firms have relied on the vastness of the domestic market for their business expansion. Few such firms individually have the knowledge and expertise about selling overseas or have been able to afford the front-end costs associated with foreign market penetration, and generally do not have access to trade-related services (e.g., foreign market research, distribution, and financing) available to larger companies.

Export trading companies (ETC's) generally assume the risks associated with international trade by taking title to goods domestically and handling subsequent export operations. Economies of scale, not usually available to a small- or medium-sized company operating individually, are generated by ETC's because they export large volumes of products from many sources at lower per-unit costs through established networks of overseas offices, transportation, insurance, and warehouses.

The Export Trading Company Act of 1982 is intended to increase U.S. exports of goods and services by small- and medium-size businesses and encourage the formation of ETC's primarily by removing two impediments: (1) restrictions on trade financing and (2) uncertainty about the application of U.S. antitrust laws to export trade. The Webb-Pomerene Act of 1918[10] permitted U.S. firms to form export associations, but did not include trade in services and did not provide the kind of certainty from antitrust prosecution that encouraged ETC formation. U.S. banking laws have traditionally imposed strict separation between banks and commercial enterprises, thus precluding banking participation in ETC's.

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[9] Public Law 97-290, approved October 8, 1982, 15 U.S.C. 4001-4003, 12 U.S.C. 1841-1843, 15 U.S.C. 4011-4021.

[10] Public Law 65-126, ch. 50, approved April 10, 1918, 15 U.S.C. 61-65.

Bank participation

Title II of the ETC Act encourages banking organization participation in ETC's and, thus, the use of bank financial resources while limiting bank investment in such entities. It amends the Bank Holding Company Act to allow bank holding companies and bankers' banks to invest in one or more ETC's which meet the statutory definition under title II provided the total investments do not exceed 5 percent of consolidated bank capital and surplus. Banks may extend credits to ETC's providing such loans do not exceed 10 percent of the bank's capital and surplus. Banking organizations may own up to 100 percent equity in an ETC. Banks must notify the Federal Reserve Board (FRB) at least 60 days prior to investing and may proceed with the intended investment if the FRB raises no objection within that period.

Banks are generally subject to the collateral requirements in the Federal Reserve Act for loans to the ETC unless the FRB grants a waiver. It may not extend credit to the ETC or the ETC's customers on terms more favorable than those afforded similar borrowers in similar circumstances.

The ETC is intended to provide export trade services, not to be a manufacturer or agricultural producer except for incidental product modification (e.g., repackaging) necessary to facilitate foreign sales. It cannot act as principal agent or broker on risks located or activities performed in the United States. The ETC must be exclusively engaged in activities related to international trade and organized and operated principally for purposes of exporting U.S. goods and services.

Loan guarantee program

Title II of the ECT Act also establishes a program for loan guarantees by the Export-Import Bank of the United States (Eximbank) to ETC's or other exporters. The objective is to provide access to working capital loans that (1) otherwise would not have been provided without Eximbank assistance, and (2) without which the ETC or exporter would not be able to support exports of products that are unlikely to be sold abroad through other means. Guarantees cover only loans used for a specific export-related activity, are for 90 percent of the principal amount of the loan, and generally have a term of one to twelve months.

Antitrust provisions

Titles III and IV of the ETC Act address the problem of uncertainty about the application of U.S. antitrust laws to export trade, and are applicable to all exporters, not just ETCs. Title III provides certification procedures under which any person engaged in export trade can determine in advance whether proposed export conduct qualifies for specific antitrust protection. Title IV clarifies the jurisdictional reach of the Sherman Antitrust Act [11] and the Federal Trade Commission Act [12] to export trade.

A certification of review is issued by the Secretary of Commerce with the concurrence of the Department of Justice which protects its holder and the members identified in the certificate from private treble damage actions and government criminal and civil suits under U.S. Federal and state antitrust laws for the export conduct specified in the certificate. Any person who has been injured by the certified conduct, however, may bring a suit for actual damages under certain conditions.

To be certified, the proposed export trade, export trade activities, and methods of operation must meet the following four criteria:

1. It cannot result in substantial lessening of competition or restraint of trade in the United States, nor a substantial restraint of the export trade of any competitor;
2. It may not unreasonably enhance, stabilize, or depress prices within the United States;
3. It cannot constitute unfair methods of competition against competitors; and
4. It cannot include any act that may reasonably be expected to result in the sale or resale in the United States of the goods or services exported.

Export Financing

EXPORT-IMPORT BANK

The Export-Import Bank of the United States (Eximbank), an independent U.S. Government agency, has provided financing for exports of U.S. origin or manufacture for more than 45 years. Created in 1934 by Presidential Executive Order, the Bank was established on a statutory basis as a U.S. Government corporation in 1945 with passage of the Export-Import Bank Act.[13] Since then Eximbank's operating charter has been renewed periodically, most recently on November 30, 1983, when it received a 3-year extension until September 30, 1986. At the same time significant changes were made in many of the provisions of the Act.

The Eximbank is part of the Federal budget and each year the Congress sets limits on the Bank's authorization of loans, guarantees and insurance, and on the amount of administrative and entertainment expenses the Bank can issue. The Eximbank does not receive appropriations of taxpayers' funds from the Congress. Its lending needs are met by borrowings from the Treasury and Federal Financing Bank (at current market rates for government debt), fees and repayments on existing loans. The Bank is authorized to issue obligations for purchase by the Treasury, but the direct Treasury borrowing limit on such obligations outstanding at any one time cannot exceed $6 billion. The Eximbank cannot have outstanding at any one time loans, guarantees, and insurance which exceed an aggregate $40 billion.

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[11] Act of July 2, 1890, ch. 647, 15 U.S.C. 1-7.

[12] Public Law 63-203, ch. 311, approved September 26, 1914, 15 U.S.C. 41-51.

[13] Public Law 79-173, approved July 12, 1945, amended by Public Law 98-181, approved November 30, 1983, 12 U.S.C. 635.

The Bank was capitalized in 1945 with $1 billion subscribed by the United States. Since that time, it has supported more than $160 billion in U.S. export sales, paid dividends to the Treasury amounting to slightly more than $2 billion, and produced retained earnings of more than $2 billion. The disparity between costs of Eximbank borrowings and the income from operations during 1980–1982 (despite the increases in rates within the loan limits allowable to remain competitive) has led to Eximbank losses in fiscal years 1982 and 1983.

The Bank is managed by a Board of Directors, including five full-time Directors appointed by the President and confirmed by the Senate, and two ex officio, non-voting members, the Secretary of Commerce and the U.S. Trade Representative. No more than three of the full-time Directors can be from the same party. The Directors serve for fixed, staggered 4-year terms.

Policy objectives and guidelines

The statutory objectives and purposes of the Eximbank are "to aid in financing and to facilitate exports and imports and the exchange of commodities and services between the United States or any of its territories or insular possessions and any foreign country or the agencies or nationals thereof." In recent years governments of other major exporting countries have subsidized their exporters through generous financing practices, such as the mixing of aid and commercial credits, offering of guarantees to offset the impact of inflation and foreign exchange risks, and the use of artificially low interest rates. An International Arrangement on Guidelines for Officially Supported Export Credits [14] was adopted in April 1978 by 22 major exporting nations under the auspices of the Organization for Economic Cooperation and Development, establishing minimum cash payments and interest rates, creating uniform maximum repayment periods, and defining other lending standards. More recent negotiations have significantly reduced the subsidy element in official export credits.

Under the most recent amendments passed in 1983 to the Export-Import Bank Act of 1945, Eximbank has been directed as its primary mandate to offer financing at rates and terms which are fully competitive with foreign official export credit terms. Terms and conditions do not need to be equivalent to those offered by foreign countries as long as the effect of such terms and conditions is to neutralize financing offered by Eximbank's counterpart. Eximbank has also been directed to establish a program of tied aid credit to counter the tied aid credits offered by other export credit agencies.

The Eximbank is required by statute to take into consideration any potential adverse impact of a loan guanantee on U.S. employment, the competitive position of U.S. industry, and on the availability of materials in short supply. Special consideration is given to exports that generate production and jobs in depressed areas and to strengthening the competitive position of U.S. exporters.

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[14] OECD Doc. No. TD/Consensus/78.4 (April 1978), revised TD/Consensus/82.41 (December 1982).

Certain statutory restrictions also apply to Eximbank activities. For example, the Bank is prohibited or restricted from doing business with certain Communist countries (including the Soviet Union) and South Africa. The Bank must consider environmental effects abroad of certain projects, such as nuclear power projects and those involving highly toxic materials that may endanger public health.

Eximbank programs

Eximbank major program operations generally fall into two financing categories. The first is the buyer credit or project financing program, which provides direct loans at fixed interest rates and long terms (normally more than 5 years) to a public or private overseas buyer, and/or financial guarantees ensuring repayment of private source loans for heavy capital equipment and capital-intensive projects.

Project financing supports the exports of "turnkey" projects such as manufacturing, electric power and petrochemical plants, and large mining and construction operations. This program also covers heavy capital equipment exports such as commercial jet aircraft and locomotives. As of mid-1982 equipment and services financing for projects accounted for roughly 80 percent of the Bank's $37.5 billion in outstanding commitments. The largest part of direct project financing (in a typical year as much as 70 percent including aircraft or 90 percent excluding aircraft) assists in financing U.S. exports to creditworthy buyers in developing countries.

The second major program involves the supplier credit programs, which offer assistance through medium-term commercial bank guarantees, short- and medium-term export credit insurance, and the medium-term and small business credit programs. The supplier credit program is designed to support less costly transactions where repayment periods are either short-term (up to 6 months) or medium-term (from 6 months to 5 years).[15]

Several other programs have been introduced recently: (1) services specifically designed for small exporters; (2) special facilities to support agricultural exports; (3) a lease guarantee program; (4) an overseas dealer/distributor program; (5) in special circumstances, guarantees of export credit denominated in convertible currencies other than U.S. dollars; and (6) guarantees of loans to export trading companies.

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[15] Under the commercial bank guarantee program, the Bank guarantees repayment of medium-term export obligations acquired by U.S. financial institutions from U.S. exporters. The purpose of the program is to facilitate the export of U.S. capital and quasi-capital goods through the U.S. commercial banking system. The Bank assumes commercial and political risks U.S. exporters or private financial institutions are unwilling or unable to undertake.

The export credit insurance program is operated in cooperation with a private association, the Foreign Credit Insurance Association, a group of U.S. property, casualty, and marine insurance companies. It sells and services export credit insurance policies which protect an exporter against non-payment for its foreign receivables and thereby encourages the exporter to offer competitive terms of repayment to foreign buyers.

Under the medium-term credit program, Eximbank makes a fixed interest rate loan commitment to a U.S. bank that is financing an export sale that faces subsidized, officially supported foreign export credit competition and lends its funds to the bank.

The small business credit program enables U.S. commercial banks to extend fixed-rate, medium-term export loans by providing standby assurance that the bank can borrow from the Eximbank against the outstanding value of a medium-term foreign debt obligation. Such fixed-rate financing is necessary to obtain a foreign order but commercial banks are reluctant to provide them on medium-term transactions because of fluctuations in their cost of funds.

Operating guidelines

The Export-Import Bank Act, as amended, states that the Bank "should supplement and encourage, and not compete with private capital" or with programs of the Commodity Credit Corporation. The Bank does not provide credit support for transactions which will proceed without its assistance. Generally, the Bank will not provide lines of credit, credit support for sales to developed or rich countries, sales of military goods or services, or credit for sales of older generation aircraft.

A cornerstone of Eximbank lending criteria since its inception and a statutory requirement is obtaining reasonable assurance of repayment. The Bank normally requires that overseas buyers make cash payments of at least 15 percent of the U.S. contract price. Guarantees of repayment may also be required either from a government institution in the buyer's country or from a major lending institution.

The percentage of Eximbank financing (generally between 65 percent and 85 percent) varies by type and case to case, depending particularly on the existence and nature of officially supported foreign competition. The Eximbank loans money at fixed interest rates which are reviewed quarterly by the Board of Directors and revised where appropriate within international Arrangement levels.

COMMODITY CREDIT CORPORATION AND PUBLIC LAW 480

To help finance sales of farm commodities abroad, the U.S. Department of Agriculture administers several concessional sales and credit programs. These include concessional credit programs under the authority of the Agricultural Trade Development and Assistance Act of 1954 as amended, commonly known as Public Law 480;[16] and concessional sales and commercial credit programs of the Commodity Credit Corporation (CCC) authorized by the Food for Peace Act of 1966.[17]

PUBLIC LAW 480

Public Law 480 was extended for 4 years to December 31, 1985, by the Agriculture Food Act of 1981.[18] According to this Act, the purpose of Public Law 480 is "to expand international trade; to develop and expand export markets for United States agricultural commodities; to use the abundant agricultural productivity of the United States to combat hunger and malnutrition, and to encourage economic development in the developing countries, with particular emphasis on assistance to those countries that are determined to improve their own agricultural production; and to promote in other ways the foreign policy of the United States".

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[16] Public Law 83-480, approved July 10, 1954, 7 U.S.C. 1701-1736d.

[17] Public Law 89-808, approved November 11, 1966.

[18] Public Law 97-98, approved December 22, 1981.

Public Law 480 sales are generally limited to low-income countries. Title I of Public Law 480 authorizes sales of U.S. agricultural commodities on concessional credit terms. Under this title, the United States extends long-term dollar credits to eligible countries at very low interest rates with repayment periods varying from 20 to 40 years. Title III of the Act allows recipient countries to use the local currency proceeds from the domestic sale of commodities purchased under title I to promote their agricultural development, emphasizing aid to the rural poor. The money used to implement approved projects is considered as partial repayment of the title I debt to the United States. All sales agreements include provisions that safeguard normal U.S. trade channels and do not disrupt world prices or normal patterns of commercial trade with friendly countries.

Total funding for titles I and III for fiscal year 1983 was $849.5 million; for fiscal year 1984 was $897 million; and proposed funding for fiscal year 1985 is $1,021 million.

COMMODITY CREDIT CORPORATION (CCC)

The CCC offers commercial credit programs designed to maintain and expand overseas markets for U.S. farm products. The largest program is called the Export Credit Guarantee Program (GSM-102). CCC offers risk guarantees against defaults on payments due from foreign banks for privately financed agricultural export credit sales with terms of 3 years or less. Sources of defaults have included exchange controls, government actions, or bankruptcy of a private foreign bank. Under this program, repayment rates and terms of interest are set by U.S. banks. In fiscal year 1984, funding levels were $3,001 million for this program.

Under a second program, the Export Credit Sales Program (GSM-15), the CCC provides the financing of U.S. agricultural exports for a maximum period of 3 years. The usual financing period is 12 months. The CCC acts as an intermediary between the U.S. exporter and the foreign buyer by extending a line of credit to the foreign purchaser and making an offsetting direct payment to the U.S. exporter. Interest rates are normally above CCC's current borrowing cost from the U.S. Treasury.

This program, first implemented in 1956, had financed $9.29 billion of U.S. farm exports by October 1980. After a hiatus of 2 years, the program again received funding in conjunction with a "blended credit" program (blending direct credit with guarantees). For fiscal year 1984, GSM-15 is authorized to spend $91.8 million on direct credit under the blended credit program for U.S. farm exports.

Additional CCC authorities include the Direct Sales Program, which authorizes CCC to sell CCC-owned commodities at negotiated prices to voluntary agencies or on a government-to-government basis when those commodities are to be used for emergencies or other restricted uses; authority to barter surplus agricultural commodities for goods and services needed by the U.S. Government; and two nonfunctioning intermediate credit sales programs.

Chapter 5: GENERAL TRADE-RESTRICTIVE AUTHORITY

International Emergency Economic Powers Act

In 1977 Congress passed the International Emergency Economic Powers Act (IEEPA).[1] The Act grants the President emergency authority to regulate foreign exchange transactions, transfer of audit or payments between banking insitutions where a foreign interest is involved, import or export of currencies or securities, and to control or freeze property transactions where a foreign interest is involved. The President may exercise this authority only to respond to an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States."

In order to subject peacetime regulation of international economic transactions to closer congressional scrutiny, IEEPA removed from the Trading With the Enemy Act [2] the broad authority of the President to control economic transactions during national emergencies. The IEEPA instead conferred upon the President limited authority to exercise controls on international economic transactions during national emergencies, and established procedures to govern the use of those authorities. IEEPA is currently being used as the authority for imposing export controls under certain circumstances in the absence of renewal of the Export Administration Act of 1979 by the 98th Congress.[3]

The international emergency economic authorities granted to the President under IEEPA broadly parallel section 5(b) of the Trading With the Enemy Act, except for the powers to vest foreign property, to regulate purely domestic transactions, to regulate gold or bullion, and to seize records. These powers, which are removed from Presidential peacetime authority, are retained only in time of war under the Trading With the Enemy Act. The economic sanctions that may be imposed under IEEPA, however, remain extensive. The President may "by means of instructions, licenses, or otherwise . . . investigate, regulate, prevent, or prohibit" virtually all aspects of foreign trade, from the transfer of exchange or credit to the import or export of currency and goods. The only international transactions exempted from this control authority are certain personal communications and charitable donations of necessities.

IEEPA requires the President to consult with Congress whenever possible before declaring a national emergency. Once a national emergency is in effect, the President is required to submit to Congress a report explaining and justifying his actions and designating the countries against which such actions are to be taken. The President is also required to update the report every 6 months while the emergency is in effect.

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[1] Public Law 95-223, approved December 28, 1977, 91 Stat. 1625, 50 U.S.C. 1701-1706.

[2] 40 Stat. 411, 50 App. U.S.C. 1-44. See Discussion of Trading With the Enemy Act, infra.

[3] Two bills (H.R. 3231 and S. 979) to renew the Export Administration Act of 1979 were passed by the House and Senate in the 98th Congress, but the conference committee was unable to resolve differences between the bills, and therefore the Act expired.

Application

Both President Carter and President Reagan have exercised authority under IEEPA in connection with the taking of American hostages in Iran. In response to the seizure of personnel at the American embassy in Tehran, President Carter, pursuant to IEEPA, declared a national emergency on November 14, 1979. In conjunction with the national emergency, President Carter imposed a freeze on Iranian assets, blocking the removal of "all property and interests in property of the Government of Iran its instrumentalities and controlled entities and the Central Bank of Iran, which are or become subject to the jurisdiction of the United States or which are or come within the possession or control of persons subject to the jursidiction of the United States." [4]

President Reagan has also invoked his authority under IEEPA to continue administering export controls on two occasions. The Export Administration Act of 1979 (EAA),[5] which was due to expire September 30, 1983, was temporarily extended through October 15, 1983.[6] On October 15, 1983 the EAA expired and the President extended the regulations issued under it by using authority of the IEEPA.[7] The Congress subsequently extended the EAA through February 29, 1984,[8] and President Reagan rescinded his action under emergency authority.[9] The EAA was extended for the final time until March 30, 1984,[10] and expired at that time. On March 1, 1984, the President again extended the export administration regulations under authority of the IEEPA pending resolution of House-Senate differences on legislation reauthorizing the Export Administration Act.[11] The conference was not able to reach agreement, however, and the 98th Congress adjourned on October 12, 1984, without having reauthorized the EAA. The IEEPA, meanwhile, continues to be invoked as the legal authority for regulations administering export controls.

Trading With the Enemy Act

The Trading With the Enemy Act [12] prohibits trade with any enemy or ally of an enemy during time of war. From enactment in 1917 until 1977, the scope of the authority granted to the President under this Act was expanded to provide the statutory basis for control of domestic as well as international financial transactions and was not restricted to trading with "the enemy." In response to the use of the Act's authority under section 5(b) during peacetime for domestic purposes that were often unrelated to a preexisting declared state of emergency, Congress amended the Act in 1977. In 1977 Congress removed from the Trading With the Enemy Act the authority of the President to control economic transactions during peacetime emergencies.[13] Similar authorities, though more limited in scope and subject to the accountability limitations of the National Emergency Act of 1977,[14] were conferred upon the President by the International Emergency Economic Powers Act.[15] Presidential authority during wartime to regulate and control foreign transactions and property interests were retained under the Trading With the Enemy Act. In addition, the 1977 legislation authorized the continuation of various foreign policy controls implemented under the Trading With the Enemy Act, such as trade embargoes and foreign assets control.[16] The retention of such existing controls, however, was made subject to 1-year extensions conditioned upon a Presidential determination that the extension is in the national interest.

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[4] Exec. Order No. 12170, 44 Fed. Reg. 65279.

[5] Public Law 96-72, approved September 29, 1979, 50 App. U.S.C. 2401-2420.

[6] Public Law 98-108, approved October 1, 1983.

[7] Exec. Order No. 12444, October 14, 1983.

[8] Public Law 98-207, approved December 5, 1983.

[9] Exec. Order No. 12451, December 20, 1983.

[10] Public Law 98-222, approved February 29, 1984.

[11] In April 1984, House and Senate conferees began meeting to resolve differences between the House bill (H.R. 3231) and the Senate bill (S. 979).

[12] Public Law 65-91, approved October 6, 1917, ch. 106, 40 Stat. 411, 50 App. U.S.C. 1-44.

Background

The Trading With the Enemy Act was passed in 1917 "to define, regulate, and punish trading with the enemy". The Act was designed to provide a set of authorities for use by the President in time of war declared by Congress. In its original 19 sections, the Trading With the Enemy Act provided general prohibitions against trading with the enemy; authorized the President to regulate and prohibit international economic transactions by means of license or otherwise; established an office to administer U.S.-held foreign property; and set up procedures for claims to such property by nonenemy persons, among other provisions. The original 1917 Act appeared not to authorize the control of domestic transactions and limited its use to wartime exigencies.

Over the years, through use and amendment of section 5(b), the basic authorizing provision, the scope of Presidential actions under the Trading With the Enemy Act was greatly expanded. First, the Act was expanded to control domestic as well as international transactions. Second, the authorities of the Act were used to apply to presidentially declared periods of "national emergency" as well as war declared by Congress. From 1933, when Congress retroactively approved President Roosevelt's declaration of a national banking emergency by expanding the use of section 5(b) to include national emergencies, until 1977, when Congress amended section 5(b) by passage of the International Emergency Economic Powers Act, the President was authorized in time of war or national emergency to:

—regulate or prohibit any transaction in foreign exchange, any banking transfer, and the importing or exporting of money or securities;

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[13] Public Law 95-223, title I, approved December 28, 1977.

[14] The National Emergency Act of 1977 provided a statutory role for Congress in the declaration and termination of national emergencies. Public Law 94-412, 90 Stat. 1255, 50 U.S.C. 1601 et seq.

[15] See discussion of International Emergency Economic Powers Act, supra.

[16] July 1, 1977, the date of the application of the extension of existing authorities, was chosen to avoid the use of the Trading With the Enemy Act authority for extending export control regulations. See House Report No. 95-459.

—prohibit the withdrawal from the United States of any property in which any foreign country or national has an interest;
—vest, or take title to, any such property; and
—use such property in the interest and for the benefit of the United States.

The Trading With the Enemy Act did not provide a statement of findings and standards to guide the administration of section 5(b). There was no provision in the Act for congressional participation or review or for Presidential reporting at specified periods for actions undertaken under section 5(b). There was no fixed time period for terminating a state of emergency. Nor was there any practical constraint on limiting actions taken under emergency authority to measures related to the emergency.

Application

By 1977 a state of national emergency had been declared by the President on four occasions. In 1933 President Roosevelt declared a national emergency to close the banks temporarily and to issue emergency banking regulations. In 1950 President Truman declared a national emergency in connection with the Korean conflict. President Nixon declared a national emergency in 1970 to deal with the Post Office strike and another in 1971 based on the balance-of-payments crisis. Under the 1971 emergency, President Nixon initially imposed an import surcharge under a different authority but later invoked section 5(b) as an additional authority when the action was challenged in court.[17]

In response to these states of emergency, Presidents have used the powers of section 5(b) to deal with a number of varied events. In 1940 and 1941, President Roosevelt used section 5(b) to freeze the U.S.-held assets of the Axis powers and countries occupied by them to prevent their falling into the hands of the enemy powers. In August 1941, President Roosevelt, under section 5(b) authority, ordered the imposition of consumer credit controls by the Federal Reserve Board as an anti-inflationary measure. These executive uses by President Roosevelt were retroactively ratified by Congress.

The 1950 Korean emergency has been used in conjunction with section 5(b) powers for a wide range of controls, among them the imposition of a total embargo on transactions with China and North Korea in December 1950. In 1968, President Johnson, citing the authority of section 5(b) and the continued existence of the 1950 emergency, imposed foreign direct investment controls on U.S. investors. These controls remained in effect until they were eliminated by legislation in 1974. During the period 1969 through 1976, Presidents have invoked the 1950 and 1971 emergencies to extend temporarily export control regulations.

Four sets of regulations controlling international transactions with specific countries are currently in effect pursuant to the authority of section 5(b) and the 1950 Korean national emergency. First, under the Foreign Assets Control Regulations,[18] all transactions between the United States and China, North Korea, Vietnam, and Cambodia are prohibited unless licensed by the Department of the Treasury. The regulations also block all assets of those countries held in the United States. The relaxation of U.S.-Chinese relations resulted in 1971 in changing these regulations by allowing general trade between the United States and China.

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[17] The U.S. Customs Court found the use of section 5(b) invalid, but this decision was later reversed on appeal. *U.S.* v. *Yoshida International*, 526 F.2d 560 (C.C.P.A. 1975).

[18] 31 CFR Part 500.

Second, the Cuban Assets Control Regulations,[19] based on section 5(b) as well as on foreign assistance legislation, impose a similar ban on virtually all transactions with Cuba.

Third, Transaction Control Regulations,[20] prohibiting any person within the United States[21] from engaging in any trade or trade-financing transaction involving transfer of strategic commodities from a foreign country to a Communist country, are also based on section 5(b) of the Trading With the Enemy Act.

Fourth, the wartime anti-Axis Foreign Funds Control Regulations,[22] issued under the authority of section 5(b), are still in effect. The regulations continue to block the assets of Czechoslovakia, East Germany, Estonia, Latvia, and Lithuania pending the settlement of claims by U.S. citizens for compensation of property confiscated after the war by the governments of those countries.

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[19] 31 CFR Part 515.
[20] 31 CFR Part 505.
[21] Any "person within the United States" includes foreign subsidiaries of U.S. firms.
[22] 31 CFR Part 520.

Chapter 6: TRADE NEGOTIATING AUTHORITY

Reciprocal Trade Agreement Authorities

Authority currently available to the President to negotiate and enter into reciprocal trade agreements with foreign governments consists primarily of authority in effect until January 3, 1988, under section 102 of the Trade Act of 1974 [1] to harmonize, reduce, or eliminate nontariff barriers or other trade-distorting measures, subject to Congressional approval of the trade agreements and implementing legislation under special procedures.

Authority for the President to negotiate and enter into trade agreements with foreign countries to modify tariffs and/or to proclaim changes in U.S. duties is limited to certain specific circumstances as described below: (1) tariff agreements negotiated and entered into under section 102 authority as amended by section 401 of the Trade and Tariff Act of 1984;[2] (2) authority to enter into a free trade area agreement with Israel under section 102 as amended by title IV of the Trade and Tariff Act (see discussion of U.S.-Israel Free Trade Area, infra.); (3) trade agreements entered into under section 123 of the Trade Act of 1974 [3] to grant new concessions as compensation for import relief actions taken under section 203 of that Act; (4) withdrawal, suspension, or modification of trade agreement obligations under section 125 of the Trade Act; [4] (5) trade agreements entered into under section 128 of the Trade Act as amended by section 308 of the Trade and Tariff Act of 1984 [5] concerning tariff treatment of certain semiconductor items; and (6) bilateral trade agreements with Communist countries providing for most-favored-nation treatment under certain conditions (for further discussion, see chapter 6).

GENERAL TARIFF AUTHORITY

Since enactment of the Reciprocal Trade Agreements Act of 1934 [6] the Congress periodically has delegated authority to the President to negotiate and to proclaim reductions in tariffs under reciprocal trade agreements, subject to specific conditions and limitations, without requiring further Congressional action. The most recent grant of such basic authority was contained in section 101 of the Trade Act of 1974, which served as the basis for negotiation of tariff reductions in the 1973–1979 Tokyo Round of Multilateral Trade Negotiations (MTN) under the General Agreement on Tariffs and Trade (GATT). The President's basic 5-year tariff negotiating and proclamation authority under section 101 expired on January 2, 1980. Section 124 of the Trade Act further provided the President, for another 2 years, residual authority to negotiate tariff adjustments within narrow limits and to correct discrepancies and anomalies resulting from the basic multilateral agreement. Section 124 expired on January 2, 1982, and has not been renewed. The President, therefore, currently does not have a general grant of authority to negotiate and proclaim changes in U.S. tariffs.

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[1] Public Law 93–618, approved January 3, 1975, 19 U.S.C. 2112.
[2] Public Law 98–573, title IV, sec. 401, approved October 30, 1984.
[3] Public Law 93–618, 19 U.S.C. 2133.
[4] Public Law 93–618, 19 U.S.C. 2135.
[5] Public Law 98–573, sec. 308.
[6] Public Law 73–316, ch. 474, approved June 12, 1934.

NONTARIFF BARRIER AUTHORITY

Trade negotiations prior to the Tokyo Round concentrated primarily on reducing or eliminating tariffs. Relatively little effort and progress was made to reduce nontariff barriers or other trade-distorting measures such as subsidies. Section 102 of the Trade Act of 1974 resulted from considerable concern about the growing importance and proliferation of such practices to the detriment of U.S. export trade and the need to develop new or more adequate international trading rules and mechanisms for their discipline. The purpose of section 102 was (1) to make clear the importance of reducing, eliminating, or harmonizing nontariff barriers and other trade-distorting measures through a Congressional policy mandate and specific legal authority for the President to negotiate reciprocal nontariff barrier trade agreements as the major focus of the MTN; (2) to expedite and reduce the uncertainties of the legislative process for approval and implementation of such trade agreements, thereby encouraging and facilitating negotiations with foreign governments; and (3) to increase and formalize the role of the Congress during the negotiating process as well as in developing domestic implementing legislation.

Section 102(a) contains a statement by the Congress on the adverse trade effects of nontariff barriers and other distorting measures and urges the President to take all appropriate and feasible steps within his power to harmonize, reduce, or eliminate such practices, including negotiation of trade agreements with foreign countries. Such agreements may also provide for the prohibition of, or limitations on, the use of such barriers or other distortions. Section 102 as amended by the 1984 Act applies to U.S. foreign direct investment as well as to trade in both goods and services.

Section 102(b) of the Trade Act authorized the President to enter into such trade agreements for 5 years until January 3, 1980. Section 1101 of the Trade Agreements Act of 1979 extended the authority for 8 years until January 3, 1988.

In contrast to traditional tariff proclamation authority, however, a nontariff barrier agreement negotiated under section 102 authority cannot enter into force for the United States and become binding as a matter of domestic law unless and until the President adheres to certain requirements for presentation to the Congress and implementing legislation approving the agreement and any changes in U.S. law is enacted into law. Sections 102(c)–(f) and sections 151–154 of the Trade Act prescribe the following procedures for Congressional approval:

1. Before entering into an agreement, the President must consult with the appropriate committees of jurisdiction over

subject matters affected by the agreement, especially regarding issues of implementation.

2. The President must notify the Congress of his intention to enter into the agreement 90 days before doing so, and thereafter promptly publish his intention in the Federal Register.

3. After entering into the agreement, the President must submit a copy of the agreement to the Congress, together with a draft implementing bill, a statement of any administrative action proposed to implement the agreement, an explanation of how the bill and statement change or affect existing law, and a statement of reasons why the agreement serves the interests of U.S. commerce and why the bill and proposed action are required and appropriate. An implementing bill must contain provisions approving the agreement and the statement of administrative action, and any amendments to current law or new authority required or appropriate to implement the agreement.

4. The implementing bill is introduced in both Houses of Congress on the day it is submitted by the President and referred to the committees of jurisdiction. The committees have 45 legislative days in which to report the bill; they are discharged automatically from further consideration after that period.

5. Each House votes on the bill within 15 legislative days after the measure has been received from the committees. A motion in the House to proceed to consideration of the implementing bill is privileged and not debatable. Amendments are not in order.

Although statutory, the legislative procedures were enacted as an exercise of the rulemaking powers of each House of Congress, and are part of each House's rules. The procedures may be changed in the same manner as any other rules.

The purpose of the approval process is to preserve the constitutional role and fulfill the legislative responsibility of the Congress with respect to agreements which often involve substantial changes in domestic laws. The consultation and notification requirements prior to entry into an agreement and introduction of an implementing bill ensure that Congressional views and recommendations with respect to provisions of the proposed agreement and possible changes in U.S. law or administrative practice are fully taken into account and any problems resolved in advance of formal Congressional action. At the same time, the procedure ensures certain and expeditious action on the results of the negotiation and on the implementing bill.

Section 102 authority was used successfully to approve the agreements concluded in the MTN and to implement changes in U.S. law under the Trade Agreements Act of 1979. That law extended the section 102 authority for an additional 8 years in order to enable the President to negotiate improvements or adjustments in existing agreements and to negotiate and enter into new agreements on other nontariff measures not dealt with in the MTN.

Section 2(c) of the 1979 Act requires the President to submit a draft bill and statement of any administrative action to the Congress whenever he determines it is necessary or appropriate to amend, repeal or enact a statute to implement any requirement, amendment, or recommendation concerning an agreement. Procedures and requirements similar to sections 102 and 151–154 of the Trade Act of 1974 apply, except the President is required to consult at least 30 days in advance with the House Committee on Ways and Means and the Senate Committee on Finance and any other committees of jurisdiction on the subject matter and implementation.

TARIFF AUTHORITY UNDER SECTION 102

In conjunction with trade agreement authority granted the President to establish a free trade area with Israel, section 102 authority was amended by section 401 of the Trade and Tariff Act of 1984 to include trade agreements on tariffs under certain specific circumstances. Section 102(b) as amended authorizes the President to enter into a trade agreement providing for elimination or reduction of any duty with any country other than Israel if, in addition to the advance consultation and 90-day prior notification procedures of present law the following conditions are met: (1) the country requested negotiation of the agreement; (2) at least 60 legislative days in advance of the 90-day notice prior to entry into the agreement the President notifies and consults with the House Committee on Ways and Means and Senate Committee on Finance regarding the negotiation of the agreement; and (3) neither Committee has disapproved of the negotiations within that 60-day period. Proclamation of tariff changes is subject to Congressional approval of the trade agreement and implementing legislation under the same special sections 151–154 procedures applicable to section 102 agreements on nontariff barriers.

NEGOTIATING OBJECTIVES

Sections 102 through 108, and section 121 of the Trade Act of 1974 set forth various U.S. negotiating objectives for use of section 102 authority reflecting particular interests at the time of the MTN; section 305 of the Trade and Tariff Act of 1984 supplements and updates these objectives with respect to more recent major trade negotiating concerns. These negotiating objectives include:

—More open and equitable market access and the harmonization, reduction, or elimination of trade distorting devices, to the maximum extent feasible including agricultural as well as industrial barriers (section 103).

—To the maximum extent feasible in appropriate product sectors competitive opportunities for U.S. exports in developed countries equivalent to the opportunities afforded their imports in U.S. markets (section 104).

—Bilateral trade agreements providing for mutually advantageous economic benefits, if the President determines they will more effectively promote U.S. economic growth and employment (section 105).

—Trade agreements with developing countries to promote their economic growth and mutual market expansion (section 106).

—International rules and procedures on the use of temporary import safeguard measures (section 107).

—Trade agreements to assure U.S. access at reasonable prices to necessary supplies (section 108).

In addition, section 121 of the Trade Act of 1974 requires the President to take such action as necessary as soon as practicable to bring prior trade agreements and their application into conformity with principles promoting development of an open, nondiscriminatory, and fair world economic system, including specific revisions of the GATT, and to enter into trade agreements to the extent feasible to establish these principles. Any agreement involving any change in Federal law requires implementing legislation unless Congress has previously delegated authority. Trade agreements entered into under section 121 may be submitted for Congressional approval under the special sections 151–154 procedures.

Section 104A of the Trade Act, as added by section 305 of the Trade and Tariff Act of 1984, includes three further negotiating objectives under section 102 authority:

—With respect to trade in services, to reduce or eliminate barriers or other distortions (including denial of national treatment and restrictions on establishment and operation in foreign markets) and to develop internationally agreed rules.

—With respect to foreign direct investment, to reduce or eliminate barriers, including unreasonable barriers to establishment, and to develop internationally agreed rules.

—With respect to high technology products, to maximize openness in trade and investment; to eliminate or reduce foreign barriers to exports or investment; to achieve various commitments such as on foreign procurement, national treatment, and joint scientific cooperation, and effective minimum safeguards for acquisition and enforcement of intellectual property rights and the property value of data.

In addition, section 181 as added by the 1984 Act requires the USTR, through the interagency trade mechanism, to identify, analyze, and estimate the impact of acts, policies, and practices which constitute significant barriers to, or distortions of, U.S. exports of goods or services and foreign direct investment. The USTR must report the analysis and estimates annually to the House Committee on Ways and Means and Senate Committee on Finance with information on any action taken (or reasons for no action) to eliminate the measures, such as under section 301 or negotiations or consultations with foreign governments. The USTR must also keep the committees informed on trade policy priorities to expand market opportunities.

TRADE IN WINE

The Wine Equity and Export Expansion Act of 1984, title IX of the Tariff and Trade Act of 1984,[7] requires the U.S. Trade Representative (USTR) to designate major wine trading countries which are potentially significant markets for U.S. wine and which maintain tariff and nontariff barriers to, or other distortions of, U.S. wine trade. The President must direct the USTR to consult with each country to seek the reduction or elimination of these barriers or distortions. The President also is required to submit a report on each country to the House Committee on Ways and Means and the Senate Committee on Finance by November 30, 1985, containing: (1) a description of each trade barrier; (2) an assessment of whether each barrier is subject to an existing trade agreement; (3) action proposed or taken to reduce or eliminate the barriers, including action under the Trade Act of 1974; (4) reasons for not taking action; and (5) recommendations to Congress on any additional authority or action considered necessary and appropriate. If the President determines that action is appropriate to respond to any unfair tariff or nontariff barrier on U.S. wine, he must take all appropriate and feasible action under the Trade Act of 1974. The President is also encouraged to initiate a wine export promotion program in cooperation with winery representatives.

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[7] Public Law 98–573, title IX, approved October 30, 1984.

SPECIFIC TRADE AGREEMENT AUTHORITIES

Sections 123, 125, and 128 of the Trade Act of 1974, as amended by the Trade and Tariff Act of 1984, contain authorities to enter into and/or to proclaim changes in U.S. duties under trade agreements in certain specific limited circumstances.

Compensation agreement

Section 123 of the Trade Act authorizes the President to enter into trade agreements granting new concessions and to proclaim modifications or continuation of existing duties or duty-free treatment as he determines required or appropriate as compensation to foreign countries for restrictions imposed as import relief under section 203 of the Trade Act (see discussion of section 201 in chapter 2, supra). No duty reduction can exceed 30 percent of its existing level. The purpose of such concessions is to meet international obligations under the GATT to maintain the general level of reciprocal and mutually advantageous concessions with countries whose trade is adversely affected by import relief actions, and provide an alternative to the right of such countries under Article XIX of the GATT to take retaliatory action.

Termination and withdrawal authority

Section 125 of the Trade Act contains the traditional requirement that every trade agreement entered into is subject to termination or withdrawal within 3 years after its effective date, or upon 6 months advance notice thereafter. The President may terminate any proclamation at any time.

Section 125(c) provides the President explicit domestic legal authority to proclaim increased duties or other import restrictions as he deems necessary or appropriate to implement U.S. international trade agreement rights or obligations to withdraw, suspend, or modify any trade agreement concessions.

Section 125(d) authorizes the President to withdraw, suspend, or modify substantially equivalent trade agreement obligations and proclaim increased duties or other import restrictions in response to withdrawal, suspension, or modification by foreign countries of trade obligations benefitting the United States without granting adequate compensation (i.e., "self-compensation" authority). This authority was used in November 1982 by President Reagan to suspend most-favored-nation status for Poland indefinitely, based upon Poland's nonfulfillment of trade obligations undertaken in its accession to the GATT, and in view of increased repression of the Polish people by the martial law government.

No duty increase imposed under section 125(d) can exceed the higher of 50 percent or 20 percent ad valorem above the rate existing on January 1, 1975. Public hearings are required prior to taking any action, or promptly thereafter if expeditious action is necessary.

Section 125(e) requires duties or other import restrictions to remain in effect at negotiated levels for 1 year after U.S. termination of, or withdrawal from, a trade agreement, unless the President proclaims restoration of the previous level. The President must submit his recommendations to the Congress within 60 days as to the appropriate rates of duty on all affected articles. This provision prevents automatic, sudden "springbacks" to higher pre-agreement duties that could create serious economic impact.

High technology products

Section 128 of the Trade Act, as added by section 308 of the Trade and Tariff Act of 1984, authorizes the President to enter into bilateral or multilateral agreements necessary or appropriate to achieve the negotiating objectives under section 104A of the Act on high technology products and proclaim modification, elimination, or continuation of existing duty or duty-free treatment on specific semiconductor items during the 5-year period after date of enactment (i.e., until October 30, 1989) in order to implement such trade agreements.

PROCEDURAL REQUIREMENTS

Sections 131-135 of the Trade Act of 1974 require that certain procedures be followed in connection with any proposed trade agreement under sections 102, 123, or 128 authorities. These prenegotiation procedures require advice from the International Trade Commission on the probable economic effect of duty modifications on U.S. industries (section 131), advice from Executive branch agencies and other sources (section 132), public hearings (section 133), and advice from private sector advisory committees (section 135). In addition, Executive liaison with the Congress is required through Congressional designated official advisers to negotiations (section 161), transmittal of trade agreements (section 162), and annual reports on the trade agreements program and related matters (section 163). (See also discussion of Congress in chapter 7, infra).

Section 127 of the Trade Act of 1974 requires the reservation from any negotiations involving reduction or elimination of duties or other import restrictions of any article while it is subject to an import relief action under section 203 of that Act or to a national security action under section 232 of the Trade Expansion Act of 1962, or if the President determines that the national security would be impaired.

United States-Israel Free Trade Area

TITLE IV OF THE TRADE AND TARIFF ACT OF 1984

Title IV of the Trade and Tariff Act of 1984 [8] amends section 102 of the Trade Act of 1974[9] to provide authority for the President to negotiate and enter into a trade agreement creating a free trade area (i.e., bilateral duty-free treatment of imports) between the United States and Israel. Proclamation of duty reductions or elimination is subject to Congressional approval of the trade agreement and implementing legislation under modified procedural requirements of sections 102 and 151–154 of the Trade Act.

Background

On November 29, 1983, President Reagan and Israeli Prime Minister Shamir agreed to proceed with bilateral negotiations on a United States-Israel free trade area, which the Israeli Government originally proposed in 1981. Negotiations by the U.S. Trade Representative began in mid-January 1984 on the elements of an agreement. A free trade area with Israel is the first such arrangement negotiated by the United States aside from the bilateral free trade arrangement with Canada in the automotive sector only.

Unlike the Caribbean Basin Initiative (CBI) (see discussion in chapter 1, supra), the United States-Israel arrangement would be two-way free trade area. Article XXIV of the General Agreement on Tariffs and Trade (GATT) permits free trade areas or customs unions as a deviation from the nondiscrimination, most-favored-nation principle of Article I if the agreement meets certain criteria. GATT-approved free trade areas (1) must eliminate duties and other restrictive measures on "substantially all" trade between the parties; and (2) duties and other regulations of commerce maintained by the parties may not be higher or more restrictive to the trade of third countries than the parties had in place prior to the agreement. An "interim agreement" can qualify under Article XXIV if it contains a plan and schedule for formation of the free trade area "within a reasonable length of time." Waivers may be sought under GATT provisions for free trade area proposals which do not meet the requirements.

Basic authority

Section 401 of the Trade and Tariff Act of 1984 amends section 102(b) of the Trade Act of 1974 to authorize the President to negotiate and enter into trade agreements providing for elimination or reduction of U.S. duties under sections 102 and 151–154 expedited Congressional approval procedures with *Israel only.* Section 102 of the Trade Act authorizes the President until January 3, 1988, to negotiate and enter into trade agreements to harmonize, reduce or eliminate nontariff barriers under the expedited Congressional approval procedures of sections 151–154 if (1) he consults in advance with the committees of jurisdiction concerning implementation; (2) gives the Congress at least 90 days prior notification of his intention to enter into the agreement; and (3) after entry submits a copy of the agreement together with a draft implementing bill, statement of administrative action, and a statement of how the agreement serves the U.S. interest and why the bill and proposed administrative action are required. Under sections 151-154, committees of jurisdiction are automatically discharged from consideration of the implementing bill after 45 days; each House has 15 days to act on the bill permitting no amendments. As amended by section 401, the advance consultation and 90-day prior notification requirements will not apply to tariff agreements with Israel.

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[8] Public Law 98-573, title IV, approved October 30, 1984.

[9] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2112.

Product eligibility

The product coverage of a free trade area and the schedule for eliminating duties on particular products will be part of the agreement itself. Section 401 does require that the agreement take fully into account any product that benefits from a discriminatory preferential tariff arrangement between Israel and a third country if the preference has been challenged by the United States under section 301 of the Trade Act and under the GATT (e.g., citrus with the European Communities).

Any trade agreement entered into under section 102(b) with Israel can provide for the reduction or elimination of duties only on articles that meet rule-of-origin requirements under section 402 similar to those under the CBI:

1. The article must be the growth, product or manufacture of Israel or foreign materials or components must be substantially transformed into a new or different article grown, produced, or manufactured in Israel. Related provisions are designated to prevent qualification of minor pass-through operations and transshipments;
2. The article must be imported directly from Israel into the U.S. customs territory; and
3. At least 35 percent of the total value of the article must consist of materials produced in Israel plus direct cost of processing operations performed in Israel, of which 15 percent may be U.S. content.

Application of import relief laws

Sections 403 and 406 of the 1984 Act make clear that existing trade laws available to domestic industries for relief from injurious import competition or unfair trade practices would continue to apply to imports under a trade agreement with Israel. As under the CBI legislation, the President may suspend the reduction or elimination of any duty under a trade agreement with Israel and proclaim a duty as import relief under section 203 of the Trade Act of 1974 or as a national security measure under section 232 of the Trade Expansion Act of 1962. Alternatively the President may establish a margin of preference or maintain the duty reduction or elimination on Israeli articles while imposing relief on imports from other sources. The International Trade Commission must state in its report to the President on import relief investigations involving Israeli articles covered in a trade agreement whether and to what extent its injury findings and recommended relief apply to imports from Israel.

Section 404 of the Trade and Tariff Act of 1984 applies a special procedure similar to that established under the CBI whereby petitions may be filed with the Secretary of Agriculture for emergency relief on perishable products from Israel pending action on a petition filed for normal import relief action under sections 201–203 of the Trade Act of 1974. The Secretary must determine and report to the President within 14 days with a recommendation for emergency action if he has reason to believe an agricultural perishable product from Israel is being imported in such increased quantities as to be a substantial cause or threat of serious injury to the U.S. industry. The President must determine within 7 days whether to take emergency action, which consists of withdrawing the reduction or elimination of duty and restoring the original rate pending final action on the import relief petition.

Most-Favored-Nation Treatment

Nondiscriminatory treatment of trading partners has been a basic element of international trade for several centuries, although its scope and application has changed as the complexity of trade among the nations has increased. Such treatment and the principle underlying it usually are referred to as the "most-favored-nation" (MFN) treatment or principle. MFN has its origin in international commercial agreements, whereby the signatories extend to each other treatment in trade matters which is no less favorable than that accorded to a nation which is the "most favored" in this respect. The effect of such treatment is that all countries to which it applies are "the most favored" ones; hence, all are treated equally. In the context of U.S. tariff legislation, MFN treatment means that the products of a country given such treatment are subject to lower rates of duty (found in column 1 of the Tariff Schedules of the United States), which have resulted from various rounds of reciprocal, multilateral tariff negotiations. Products from countries not eligible for MFN treatment under U.S. law are subject to higher rates of duty (found in column 2 of the TSUS), which represent the rates of duty applicable at the time the United States joined the GATT.

Prior to 1934, the United States accorded MFN treatment to its trading partners reciprocally only within the scope of commercial agreements containing an MFN clause. Section 350 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1934, in effect required the nondiscriminatory application to all countries of tariff and trade concessions granted in bilateral agreements, whether or not those countries had agreements with the United States containing the MFN clause.

By becoming a signatory of the General Agreement on Tariffs and Trade (GATT), the United States, as of January 1, 1948, also accepted the basic obligation of GATT Article I to accord unconditional MFN status to all other signatories. Thus, MFN status is extended by the United States to foreign countries as a matter not only of U.S. domestic law but also as an international obligation.

The unconditional and unlimited MFN policy was changed after the enactment of section 5 of the Trade Agreements Extension Act of 1951,[10] which directed the President to withdraw or suspend MFN status of the Soviet Union and all countries under the control of international communism. This action was prompted by the outbreak of the Korean War and the support that these countries were giving to North Korea and China. As implemented, this directive was applied to all then-existing Communist countries except Yugoslavia.

In December 1960, President Eisenhower revoked the suspension of MFN status with respect to Poland. President Kennedy suspended MFN status with respect to Cuba in May 1962, pursuant to a new legislative requirement contained in section 401 of the Tariff Classification Act of 1962.[11] The Tariff Classification Act also enacted the new Tariff Schedules of the United States (TSUS), which, for the first time, included in a general headnote a current list of countries without MFN status. Section 231 of the Trade Expansion Act of 1962, as amended by section 402 of the Foreign Assistance Act of 1963, expanded the scope of the suspension of MFN status by applying it to "any country or area dominated by Communism," unless the President determined that the continued application of MFN status to Communist countries to which it was being applied at the time of the enactment of the Trade Expansion Act (i.e., to Poland and Yugoslavia) was in the national interest. The President made such a determination for both countries in March 1964.

The statutory provisions affecting the U.S. MFN policy and its practical implementation remained unchanged thereafter until enactment of the Trade Act of 1974, which contains the MFN provisions currently in force.

MFN principle under present law

The basic statute currently in force with respect to the MFN treatment of U.S. trading partners is section 126 of the Trade Act of 1974.[12] Section 126 contains the general requirement that any duty or other import restriction proclaimed to carry out any trade agreement apply on an MFN basis to products of all foreign countries, except as otherwise provided by law. The key provision embodying such exceptions with respect to tariff treatment is General Headnote 3(f) of the TSUS, which contains the list of countries denied MFN tariff status with respect to their exports to the United States. (See list under chapter 1.)

Other measures, most notably the Generalized System of Preferences, the Caribbean Basin Initiative, the United States-Israel Free Trade Area, and tariff treatment of least developed developing countries, provide specifically for application of preferential duty treatment for eligible countries and products under certain circumstances. This preferential tariff status grants terms which are more favorable than those granted to other countries which otherwise receive MFN treatment from the United States. (See separate sections and chapter 1.) With respect to nontariff measures, section 102(f) of the Trade Act of 1974 authorizes the President to recommend to the Congress that benefits and obligations of a particular agreement apply solely to the parties to that agreement or not apply uniformly to all parties, if such application is consistent with the agreement. The Agreement on Subsidies and Countervailing Duties, negotiated during the Tokyo Round of Multilateral Trade Negotiations, has been implemented by the United States on a non-MFN basis.

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[10] Public Law 49-50, ch. 141, approved June 16, 1951.
[11] Public Law 87-456, approved May 24, 1962.
[12] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2136.

MFN application to Communist countries

The Trade Act of 1974 repealed section 231 of the Trade Expansion Act of 1962. Section 401 of the Trade Act [13] presently regulates the extension of MFN tariff treatment to Communist countries. Section 401 directs the President to continue to deny MFN treatment to any country to which it was denied on the date of the enactment of the Trade Act (i.e., all Communist countries as of January 3, 1975, except Poland and Yugoslavia). Section 402 also denies MFN treatment (as well as access to U.S. Government credits, or credit or investment guarantees) to any "nonmarket economy" country ineligible for MFN treatment on the date of enactment of the Trade Act and which the President determines denies or seriously restricts or burdens its citizens' right to emigrate.

A country subject to the ban imposed by section 401 may gain MFN status only by fulfilling two basic conditions: (1) compliance with the requirements of the freedom-of-emigration provisions under section 402 of the Trade Act; [14] and (2) conclusion of a bilateral commercial agreement with the United States under section 405 of the Trade Act [15] providing reciprocal nondiscriminatory treatment.

The provisions of section 402, commonly referred to as the Jackson-Vanik amendment, allow a non-MFN, nonmarket economy country to receive MFN status (and access to U.S. financial facilities) only if the President determines that it permits free and unrestricted emigration of its citizens. Alternatively, the President may waive the requirements for full compliance of the particular country with the Jackson-Vanik requirements, if he determines that such waiver will substantially promote the objectives of the freedom-of-emigration provisions and if he has received assurances that the emigration practices of the country will henceforth lead substantially to the achievements of those objectives.

The President's waiver authority must be renewed annually. The renewal procedure under section 402(d)(5) requires the President to submit to the Congress a recommendation for a 12-month extension of the waiver authority within 30 days prior to its expiration, together with his reasons for the recommendation and a determination with respect to each country for which a waiver is in effect that the continuation of the waiver will substantially promote the objectives of the freedom-of-emigration provision.

Under the terms of the 1974 Act, the extension of the waiver authority for an additional 12-month period is automatic unless either House of Congress adopts, within 60 days after the expiration of the previous authority period, a resolution disapproving such extension either generally or with respect to a specific country. The adoption of such resolution would immediately rescind the waiver authority (and with it the grant of the MFN status) with respect to countries covered by the resolution. The constitutionality of this veto provision, however, is questionable in light of the decision of the U.S. Supreme Court on June 23, 1983, striking down a legislative veto in *Immigration and Naturalization Service* v. *Chadha*.

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[13] 19 U.S.C. 2431.
[14] 19 U.S.C. 2432.
[15] 19 U.S.C. 2435.

In addition to being contingent on compliance with the Jackson-Vanik requirements, Presidential authority to proclaim extension of MFN status to a country excluded under section 401 is subject and limited to the effective period of U.S. obligations under a bilateral commercial agreement between the United States and the country involved. Sections 404 and 405 of the Trade Act authorized the President to conclude such agreements, which must contain various provisions as prescribed by the statute concerning safeguards against disruptive imports, intellectual property rights, trade promotion, and consultations. Agreements and implementing proclamations can take effect only if Congress adopts a concurrent resolution under the expedited procedures of section 151 of the Trade Act. Agreements may remain in force for no more than 3 years, renewable for additional 3-year periods (without any Congressional approval) if past operation has been found satisfactory.

With the exception of Poland, countries listed in General Headnote 3(f) of the TSUS are being denied MFN treatment as Communist countries pursuant to the requirements of section 5 of the Trade Agreements Act of 1951, section 231 of the Trade Expansion Act of 1962 and section 401 of the Trade Act of 1974. Poland is exempt from the denial under section 401, but its unconditional MFN status was suspended indefinitely by Presidential proclamation effective November 1, 1982, under the authority of section 125(d) of the Trade Act.

Presidential waiver authority of the emigration provisions has been extended annually since 1976. The waiver authority and the authority to conclude bilateral trade agreements and grant MFN status has, thus far, been used in three instances, following Congressional approval by concurrent resolution. MFN treatment has been extended to Romania effective August 3, 1975, to Hungary effective July 7, 1978, and to the People's Republic of China effective February 1, 1980. All three underlying bilateral agreements were extended, when appropriate, for additional 3-year periods by Presidential determinations of their satisfactory operation, and are still in effect.

Chapter 7: ORGANIZATION OF TRADE POLICY FUNCTIONS

Congress

The role of the Congress in trade derives from its powers under the Constitution to regulate foreign commerce and to lay and collect duties (see Introduction). Consequently, the trade agreements program and application of duties or other import restrictions are based upon and limited to specific legislation or authorities delegated by the Congress. In order to ensure proper implementation of these laws and authorities in accordance with legislative intent, Congress has included various statutory requirements in the trade laws to limit their application, to ensure Congressional oversight of their implementation, and to fulfill its responsibility for legislating any necessary or appropriate changes in U.S. laws.

More specifically, for example, periodic delegations of authority by the Congress to the President to proclaim changes in U.S. tariff treatment in the context of trade agreements has been limited in scope and periods of time, and use of the authority subject to certain prenegotiation procedures to protect domestic interests. On the other hand, Congress has granted Federal agencies permanent authorities to administer certain laws and programs, such as trade remedy laws or trade adjustment assistance, under certain specific guidelines and subject to congressional oversight, including appropriations.

Specific statutory roles of the Congress became formalized under the Trade Act of 1974 with the grant of authority to the President under section 102 to enter into trade agreements affecting U.S. laws other than traditional changes in tariff treatment. In authorizing implementation through an expedited, no amendment procedure, Congress ensured its role through statutory consultation and notification procedures prior to submission of a draft implementing bill by the Executive.

Section 161 of the Trade Act provides for appointment at the beginning of each session of Congress of five official Congressional advisers by the Speaker of the House from the Committee on Ways and Means and five official advisers by the President of the Senate from the Committee on Finance to U.S. delegations to international negotiating sessions on trade agreements. The U.S. Trade Representative must keep each adviser and designated committee staff members informed of U.S. objectives and the status of negotiations and of any changes which may be recommended in U.S. laws. Section 162 requires transmission of any trade agreements to the Congress.

Section 163 requires annual reports from the President and from the International Trade Commission (ITC) to keep the Congress informed regarding actions taken under the various trade laws and programs. Additional reports are required on specific aspects of various authorities (e.g., from the ITC on the domestic economic impact of the Caribbean Basin Initiative).

Finally, Congress has maintained its institutional role with the Executive by requiring the USTR to advise the Congress as well as the President on trade policy developments, through requests to the ITC for studies and analyses under section 332 of the Tariff Act of 1930 of various current trade issues, and through its power to authorize and appropriate funds for the functions of major trade agencies.

Executive Branch

INTERAGENCY TRADE PROCESS

Trade policy is a major element of U.S. economic and foreign policy. A decision to raise or lower tariffs, to impose import quotas, or to take other trade policy actions affects both domestic and foreign interests. In light of the far-reaching effects of trade policy decision, a large number of U.S. Government agencies have a role to play in the development of policy. Various interagency coordinating mechanisms have been used for bringing together conflicting views and interests and resolving them so that there can be a consistent and balanced national trade policy.

Until the late 1950's, the Department of State was the major initiator and coordinator of international trade policy. The Secretary of State chaired the interagency Trade Agreements Committee which originally included eight agencies: the Departments of State, Agriculture, Commerce, and Treasury, the Tariff Commission, the Agricultural Adjustment Administration, the National Recovery Administration, and the Office of the Special Advisor to the President on Foreign Trade.

Congress authorized the President under section 242 of the Trade Expansion Act of 1962 [1] to establish a new interagency trade organization to carry out the following functions: (1) make recommendations to the President on basic policy issues arising in the administration of the trade agreements program; (2) make recommendations to the President on tariff actions; (3) advise the President on import relief actions; and (4) perform other functions with respect to the trade agreements program as the President may from time to time designate. Under this authority, President Kennedy established the Trade Expansion Act Advisory Committee.[2] The Committee was chaired by the Special Representative for Trade Negotiations. The other members were the Secretaries of State, Treasury, Defense, Interior, Agriculture, Commerce, and Labor.

The Trade Agreements Committee was replaced by the Trade Policy Committee (TPC) in 1975.[3] The TPC performs the same functions authorized by section 242 of the 1962 Trade Act. Two subordinate coordinating groups, the Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC), were subsequently created by the authority of the Special Representative.[4]

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[1] 19 U.S.C. 1801.

[2] Exec. Order 11075, January 15, 1963, 28 Fed. Reg. 473.

[3] Exec. Order 11846, March 27, 1975, 40 Fed. Reg. 14291.

[4] 40 Fed Reg. 18419, April 28, 1975.

This three-tiered interagency trade organization is chaired and administered by the United States Trade Representative (USTR). Member agencies today consist of the Departments of Agriculture, Commerce, Defense, Justice, Energy, Interior, Labor, State, Transportation, and Treasury, the Office of Management and Budget, the Council of Economic Advisors, the National Security Council, and the International Development Cooperation Agency.

The TPSC is the working level interagency group, with members drawn from the office-director level of member agencies. Over 30 subcommittees and task forces support the work of the TPSC. In the absence of consensus at the TPSC level or in the case of particularly significant policy matters, issues are referred to the Assistant Secretary-level TPRG. Disagreements at the Assistant Secretary-level are referred to the TPC for Cabinet-level review. When Presidential trade policy decisions are needed, the Chairman (USTR) submits the recommendations and advice of the Committee to the President.[5]

A Trade Negotiating Committee (TNC) was created in a 1979 reorganization. The TNC is chaired by the USTR; its member agencies are the Departments of State, Treasury, Agriculture, Commerce, and Labor.

Two additional interagency mechanisms have been created administratively and used by the Reagan Administration to coordinate trade and, more generally, international economic policy issues. President Reagan announced the establishment of the Cabinet Council on Commerce and Trade (CCCT) in a White House press release on February 26, 1981. This council is chaired by the President with the Secretary of Commerce serving as Chairman Pro Tempore.[6]

The Senior Interdepartmental Group on International Economic Policy (SIG–IEP) was established on July 23, 1982, to advise and assist the National Security Council in exercising its international economic responsibilities.[7] The SIG–IEP is chaired by the Secretary of Treasury with the Secretary of State serving as Vice Chairman. Membership includes the Secretaries of Defense, Commerce, and Agriculture, the U.S. Trade Representative, the Director of Office and Budget, the Assistant to the President for Policy Development, the Chairman of the Council of Economic Advisers, the Director of Central Intelligence, and the Assistant to the President for National Security Affairs.

OFFICE OF THE U.S. TRADE REPRESENTATIVE

Section 241 of the Trade Expansion Act of 1962 established the Office of the Special Representative for Trade Negotiations.[8] Congress' stated purpose for creating the position was to provide better balance between competing domestic and international interests in the formulation of U.S. trade policy and negotiations. The Special Trade Representative (STR), whose rank was ambassador extraordinary and plenipotentiary, was to serve as the chief U.S. representative for negotiations conducted under authority of the Act and for other trade negotiations authorized by the President.

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[5] The Senate Report on Reorganization Plan No. 3 stated that "the USTR has the authority to take decisions even in the absence of consensus or compromise among agencies, and to enforce his decisions on other agencies, subject of course to the ultimate decision-making role of the President." Senate Report 96–402, at p. 15.

[6] Members include the Secretaries of State, Treasury, Agriculture, Labor, Transportation, Justice, and Energy, the U.S. Trade Representative, and Chairman of the Council of Economic Advisors.

[7] National Security Decision Directive No. 48, July 23, 1982.

[8] Public Law 87–794, approved October 11, 1962, 19 USC 1801.

Various Executive orders issued by President Kennedy in 1963 established an Office of the Special Trade Representative and provided for the appointment of two Deputy Special Representatives for Trade Negotiations. These deputies, one based in Washington, D.C., and the other in Geneva, were assigned major responsibilities for the conduct of the 1963–67 multilateral trade negotiations under the General Agreement on Tariffs and Trade (GATT), commonly known as the Kennedy Round.

Section 141 of the Trade Act of 1974 [9] called for establishment of the office as an agency within the Executive Office of the President and expanded STR's duties to include responsibility for the trade agreements program under the Tariff Act of 1930, the Trade Expansion Act of 1962 and the Trade Act of 1974. Other duties and responsibilities also were assigned by the 1974 Trade Act and by Executive Order 11846 of March 27, 1975, as amended. The position of STR was raised to Cabinet level with the rank of ambassador; the STR was made directly responsible to the President and Congress.

Reorganization Plan No. 3 of 1979, implemented by Executive Order 12188 of January 4, 1980,[10] authorized the most recent changes in the trade responsibilities of the STR. Plan No. 3 redesignated the Office of the Special Representative for Trade Negotiations as the Office of the United States Trade Representative (USTR). The new name reflects the plan's intent for the Trade Representative to have overall responsibility, on a permanent basis for developing and coordinating the implementation of U.S. trade policy.

More specifically, the Office of United States Trade Representative, with the advice of the interagency Trade Policy Committee and its subordinate committees,[11] has primary responsibility for conducting trade negotiations and for developing international trade policy and coordinating its implementation in the following areas:

(1) matters concerning the GATT (as the chief U.S. representative to the GATT) including implementation of trade agreements, trade and commodity matters dealt with by multilateral organizations, and protection of U.S. rights under international trade and commodity agreements;

(2) expansion of U.S. exports;

(3) policy research on international trade, commodity, and direct investment matters;

(4) to the extent permitted by law, overall United States policy with regard to unfair trade practices;

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[9] Public Law 93–618, approved January 3, 1975, 19 USC 2171.

[10] 44 Fed. Reg. 69273.

[11] The Trade Policy Committee and its subordinate committees were established under section 242 of the Trade Expansion Act of 1962. USTR chairs the committees.

(5) bilateral trade and commodity issues, including East-West trade matters;

(6) international trade issues involving energy; and

(7) trade-related direct investment matters.

USTR is responsible by statute for conducting investigations and making recommendations to the President under section 310 of the Trade Act of 1974 (see separate section). Section 306(c) of the Trade and Tariff Act of 1984 specifies that USTR, through the interagency organization, is responsible for developing and coordinating U.S. policies on trade in services.

The 1979 Reorganization Plan specified that the USTR is the President's principal adviser and chief spokesman on trade, including advice on the impact of international trade on other U.S. Government policies. The USTR also became Vice Chairman of the Overseas Private Investment Corporation (OPIC), a nonvoting member of Export-Import Bank and a member of the National Advisory Committee on International Monetary and Financial Policies.

Department of Agriculture

The U.S. Department of Agriculture (USDA) was created by Act of Congress on May 15, 1862, and was administered by a Commissioner of Agriculture until 1889,[12] when the Department's responsibilities were expanded. At that time, the position of Commissioner was elevated to the rank of Secretary. Among the overall purposes of the Department are the improvement and maintenance of farm income and the expansion of foreign markets for U.S. agricultural products.

USDA is actively involved in U.S. trade policy formulation, to ensure that decisions in that area take into account their impact on U.S. agricultural interests. USDA also has direct responsibility for a variety of trade-related functions. Section 22 of the Agricultural Adjustment Act[13] charges the Secretary of Agriculture with advising the President on the effect of imports on USDA programs. Enforcement and administration of certain elements of cheese quotas and meat imports fall to the Secretary. The Trade Agreements Act of 1979 gives the Department responsibility for coordinating negotiations with foreign governments on standards-related matters in agricultural trade and for monitoring activities in that area.[14] The Agricultural Trade Act of 1978[15] authorized USDA to establish up to 25 Agricultural Trade Offices to assist U.S. exporters, trade groups, and state export marketing officials in their trade promotion efforts.

Most of USDA's international trade functions are administered by the Foreign Agricultural Service (FAS), which is supported by a network of agricultural attachés at many U.S. embassies, and analysts, marketing specialists, and negotiators based in the United States. FAS personnel supply and analyze data on foreign agricultural markets; operate a market development program; work to reduce foreign barriers to U.S. farm goods; and manage the Public Law 480 program and the Commodity Credit Corporation (CCC) Export Credit Sales Program.

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[12] 12 Stat. 387, 5 U.S.C. 511, 514, 516.

[13] 7 U.S.C. 624 (see discussion of section 22 in chapter 3, supra).

[14] 19 U.S.C. 2542.

[15] Public Law 95-501, title IV, section 401(l), approved October 21, 1978, 92 Stat. 1688, 7 U.S.C. 1765a.

The Department of Agriculture is a voting member of the Trade Policy Committee and of its subordinate committees.

DEPARTMENT OF COMMERCE

The Department of Commerce was established in 1903 as the Department of Commerce and Labor.[16] A 1913 act of Congress split the Department of Commerce and Labor into two separate departments.[17] The mandate of the Commerce Department originally was to promote the foreign and domestic commerce of the United States. In subsequent years, its authority was extended to other areas bearing on the economic and technological development of the country. The titles of the component units of the Department indicate the diversity of the agency's current programs and services: International Trade Administration, Economic Development Administration, Minority Business Development Agency, National Bureau of Standards, National Oceanic and Atmospheric Administration, Patent and Trademark Office, Bureau of the Census, Bureau of Economic Analysis, Bureau of Industrial Economics, National Technical Information Service, National Telecommunications and Information Administration, and the United States Travel and Tourism Administration.

The International Trade Administration (ITA), which was established by the Secretary of Commerce on January 2, 1980,[18] administers the Department's international trade responsibilities and activities as prescribed by Reorganization Plan No. 3 of 1979. The plan provides that the Commerce Department has "general operational responsibility for major nonagricultural international trade functions," as well as for any other functions assigned by law. Those include export development, commercial representation abroad, the administration of the antidumping and countervailing duty laws, export controls, trade adjustment assistance to firms and communities, research and analysis, and compliance with international trade agreements to which the United States is a party.

To foster U.S. exports, ITA maintains a wide range of informational and promotional programs. Some of the major informational programs are designed to match U.S. producers with overseas buyers and to provide them with accurate foreign market intelligence about export opportunities. In addition, ITA assists U.S. firms participating in international trade fairs. Through 47 district offices located in the United States and 120 posts located abroad, the ITA's U.S. and Foreign Commercial Services provide counseling and marketing assistance to U.S. exporters. ITA also has responsibility for promoting the formation of export trading companies and, with the concurrence of the Justice Department, certifying that export trading company petitions meet the required antitrust standards.

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[16] 32 Stat. 827, 5 U.S.C. 591.
[17] 37 Stat. 736, 15 U.S.C. 1501.
[18] 45 Fed. Reg. 11862, as amended by 46 Fed. Reg. 13537.

The ITA controls exports of commodities and technology for reasons of national security, foreign policy, and short supply, and issues export licenses in accordance with the export control regulations. Export control regulations are developed in consultation with other agencies, and some license applications require interagency review. The Department also investigates license violations and monitors compliance with export control laws.

Reorganization Plan No. 3 transferred the responsibility for administering the U.S. antidumping and countervailing duty laws from the Department of the Treasury to the Department of Commerce. The role of Commerce is to rule on allegations that imports from a particular country are subsidized or sold at less than fair value (i.e., dumped) and, in affirmative cases, determine the amount of the subsidy or dumping margin. The International Trade Commission determines whether subsidized or dumped imports have materially injured a U.S. industry (see discussion of antidumping and countervailing duty laws in chapter 2, supra).

The Department exercises other varied trade enforcement and administration responsibilities. In the event of a war or other national emergency, the Department is responsible for mobilizing U.S. industrial resources. As part of its industrial resources responsibilities, the Department administers section 232 of the Trade Expansion Act of 1962.[19]

In addition, the Department administers: U.S. laws which forbid U.S. firms to comply with foreign boycotts against countries friendly to the United States; the Foreign Trade Zones program which encourages processing and assembly of goods in the United States; the Trade Adjustment Assistance Program for firms, and several statutory import programs. Other important trade responsibilities include administration of the textile agreements program; providing staff support for trade negotiations; monitoring and implementing multilateral trade agreements; and providing statistical analysis and research on various elements of the U.S. international economic position, including the competitiveness of U.S. manufacturing and service industries. The Department of Commerce is a voting member of the Cabinet-level Trade Policy Committee (TPC), chaired by the U.S. Trade Representative, and of the TPC's subcabinet groups. The Secretary of Commerce also chairs the Cabinet Council on Commerce and Trade.

DEPARTMENT OF LABOR

The Department of Labor was established as the Department of Commerce and Labor in 1903[20] and was split into a separate agency in 1913.[21] The role of the Labor Department is to promote the overall welfare of U.S. wage earners.

The Deputy Under Secretary for International Affairs, who heads the Bureau of International Labor, assists in the formulation of international economic and trade policies affecting U.S. workers.

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[19] 48 Stat. 943, 19 U.S.C. 1351.

[20] 32 Stat. 827, 5 U.S.C. 591.

[21] 37 Stat. 736, 15 U.S.C. 1501.

The Department is a voting member of the Trade Policy Committee (TPC), chaired by the U.S. Trade Representative, and its subordinate committees. The Department conducts research on trade-related employment issues, helps represent the United States in international negotiations, before the International Labor Organization and in other international organizations. The Bureau is assisted in its efforts by labor attachés posted at many U.S. embassies overseas.

The Labor Department, through the Employment and Training Administration, is responsible for administration of the Trade Adjustment Assistance (TAA) program for workers, under authority given by the Trade Act of 1974. (See discussion of TAA program in chapter 2, supra.) Among the Department's TAA duties are certification of workers for eligibility to apply for benefits and issuance of guidelines for administration of benefits at the State level.

DEPARTMENT OF STATE

The Department of State, created by act of Congress in 1789, advises the President in the formulation and execution of foreign policy. The Department's primary objective is to promote the long-range security and well-being of the United States. In so doing, the Department plays a significant role in analyzing facts and making recommendations on policy and future actions on any issues that affect American interests overseas. In the formulation of U.S. trade policy, State's primary role is to provide a foreign policy perspective to interagency deliberations. State performs this task as a voting member of the Trade Policy Committee and its subordinate committees, the Cabinet Council on Commerce and Trade, and the Senior Intergovernmental Group on International Economic Policy.

The Department attaches high priority to trade, investment, and commodity issues because of their importance in U.S. foreign relations. Within the Department, the Under Secretary for Economic Affairs is principal advisor to the Secretary and Deputy Secretary in the formulation and conduct of foreign economic policy. The Bureau of Economic and Business Affairs has overall responsibility within the Department for formulating and implementing policy regarding foreign economic matters, including policies on foreign investment, natural resources and food, international trade, and international finance and development. State plays a major role in the formulation of U.S. policy in these areas and leads most U.S. delegations to international conferences or negotiations on investment and commodity issues.

DEPARTMENT OF THE TREASURY AND THE U.S. CUSTOMS SERVICE

The Department of the Treasury was created by act of Congress in 1789.[22] The Treasury Department's role and responsibilities have been broadened substantially by many subsequent acts and executive orders.

The Department of the Treasury has primary responsibility for formulation and administration of economic and financial policy; tax policy; public debt management; various law enforcement functions (through the U.S. Secret Service; Bureau of Alcohol, Tobacco and Firearms; and the U.S. Customs Service); and the manufacture of coins and currency.

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[22] 1 Stat. 65, 31 U.S.C. 1001.

The Secretary serves as the principal economic advisor to the President. He chairs the interagency Cabinet Council on Economic Affairs, which reviews and formulates policies on a wide range of domestic and international economic matters. The Secretary serves as U.S. Governor of the International Monetary Fund, the International Bank for Reconstruction and Development (World Bank), the Inter-American Development Bank, the Asian Development Bank, and the African Development Fund. The Secretary also is co-chairman of a number of bilateral economic commissions with other countries. As Chairman of the National Advisory Council on International Monetary and Financial Policies, the Secretary or his delegate plays a key role in formulating and overseeing U.S. policies toward international lending institutions and U.S. aid and trade finance policies.

The Treasury's international responsibilities are carried out by the Assistant Secretary for International Affairs, who advises and assists the Secretary and the Under Secretary for Monetary Affairs. The Office of the Assistant Secretary is divided into groups responsible for international monetary affairs, developing nations, international trade and investment, and commodities and natural resources. Supporting staff offices analyze economic and financial policies in industrial and developing countries and support Treasury's attachés abroad; coordinate U.S. policies toward the International Monetary Fund, the World Bank and other international financial institutions; monitor developments in foreign exchange markets and coordinate (with the Federal Reserve) U.S. intervention in exchange markets; collect and analyze U.S. balance of payments data and other economic and financial data affecting the U.S. and world economic outlook; coordinate policies toward financing of trade and toward foreign investment in the United States and U.S. overseas investment; and conduct other functions.

The Treasury Department maintains an active involvement in U.S. trade policy to ensure that decisions in that area include a consideration of their impact on the U.S. economy. Treasury is a voting member of the Cabinet-level Trade Policy Committee (TPC), chaired by the U.S. Trade Representative, and of the TPC's subcabinet groups. Treasury also has responsibility for the U.S. Customs Service.

U.S. CUSTOMS SERVICE

The second act of Congress, dated July 4, 1789, authorized the collection of duties on imported goods, wares and merchandise. The fifth act of Congress, passed in July 31, 1789, established customs districts and authorized customs officers to collect import duties. On March 3, 1927, the Bureau of Customs was established as a separate agency under the Treasury Department.[23] The Bureau was redesignated the United States Customs Service on August 1, 1973.[24]

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[23] 44 Stat. 1381.

[24] Treasury Department Order 165-23, of April 4, 1973.

The Customs Service collects import duties and enforces more than 400 laws or regulations relating to international trade. Among the many responsibilities falling to Customs are assessing and collecting duties, excise taxes, penalties and other fees due on imported goods; interdicting and seizing illegally entered merchandise; processing persons, carriers, cargo and mail into and out of the United States; helping enforce U.S. laws against the transfer of certain technologies to Eastern European countries, laws on copyright, patent and trademark rights; and administering quotas and other import restrictions. The U.S. Customs Service maintains close ties with private business associations, international organizations, and foreign customs services.

U.S. International Trade Commission

The U.S. International Trade Commission (USITC) is an independent and quasi-judicial agency that conducts studies, reports, and investigations, and makes recommendations to the President and the Congress on a wide range of international trade issues. The agency was established on September 8, 1916[24a] as the U.S. Tariff Commission. In 1974 the name was changed to the United States International Trade Commission by section 171 of the Trade Act of 1974.[25]

Commissioners appointed after January 9, 1975, are appointed by the President for nine-year terms, unless they are appointed to fill an unexpired term. They may not be reappointed. The Chairman and Vice Chairman are designated by the President for two-year terms, and successive Chairmen may not be of the same political party. Of the six commissioners, not more than three may be of the same political party.

The Commission has numerous responsibilities for advice, investigations, studies, and data collection and analysis which may be grouped into the following general areas: advice on trade negotiations; Generalized System of Preferences; import relief for domestic industries; East-West trade; investigations of injury caused by subsidized or dumped goods; import interference with agricultural programs; unfair practices in import trade; development of uniform statistical data; matters related to the U.S. tariff schedules; international trade studies; trade and tariff summaries. The ITC's specific responsibilities in these areas are discussed below.

Statutory authority for the Commission's responsibilities is provided primarily by the Tariff Act of 1930, the Agricultural Adjustment Act, the Trade Expansion Act of 1962, the Trade Act of 1974, the Trade Agreements Act of 1979, and the Trade and Tariff Act of 1984.

The Tariff Act of 1930 gives the Commission broad authority to conduct studies and investigations relating to the impact of international trade on U.S. industries. Various sections under title VII authorize the Commission to determine whether U.S. industries are materially injured by imports which benefit from subsidies or are priced below fair value.[26] If the Secretary of Commerce decides to suspend an antidumping or countervailing duty investigation upon reaching an agreement to eliminate the injury caused by the subsidized or dumped imports, the Commission is authorized to study whether or not the injury in fact is being eliminated. Section 337 of the Tariff Act also authorizes the ITC to investigate whether unfair methods of competition or unfair acts are being committed in the importation of goods into the United States.[27] The Commission is authorized to order actions to remedy any such violations, subject to Presidential disapproval.

[24a] 39 Stat. 795.

[25] 19 U.S.C. 2231.

[26] Secs. 704, 734, and 751; 19 U.S.C. 1671c, 1673c, and 1675c.

Upon the request of the President, the House Committee on Ways and Means, the Senate Committee on Finance, or on its own motion, the ITC conducts studies and investigations under section 332 of the Tariff Act of 1930 on a wide range of trade-related issues.[28] Public reports generally are issued following such studies and investigations. The ITC also publishes summaries outlining the types of products entering the United States, their importance in U.S. consumption, production, and trade, and other relevant information. The ITC also is required to establish and maintain statistics on U.S. trade and to work to develop an international commodity code for reporting trade statistics among countries.[29]

The Trade Expansion Act of 1962 and the Trade Act of 1974 expanded the duties of the ITC. Both laws require the Commission to review developments within an industry receiving import protection and to advise the President on the probable impact of reducing or eliminating the protection.[30]

The Trade Act of 1974 gives the Commission a Presidential advisory role on the probable domestic economic effects of trade concessions proposed during trade negotiations.[31] The ITC performs a similar advisory role in relation to duty reduction under the Generalized System of Preference.[32] Under section 201 of the 1974 Trade Act,[33] the Commission conducts investigations to determine whether increased imports are causing or threatening serious injury to the competing domestic industry and reports its findings and recommendations for relief to the President.

Sections 406 and 410 [34] of the 1974 Trade Act provide for ITC monitoring and investigation of various aspects of trade with nonmarket economies.

The Agricultural Adjustment Act [35] requires the ITC, upon the direction of the President, to investigate whether imports of agricultural products are interfering with programs of the Department of Agriculture and to present its findings and recommendations to the President.

Section 221 of the Trade and Tariff Act of 1984 established a Trade Remedy Assistance Office within the ITC to provided information on remedies and benefits available under U.S. trade laws and on the 74 procedures and filing dates for relief petitions.

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[27] 19 U.S.C. 1337.
[28] 19 U.S.C. 1332.
[29] 19 U.S.C. 1484(e).
[30] 19 U.S.C. 1981, 2253.
[31] 19 U.S.C. 2151.
[32] 19 U.S.C. 2151, 2163.
[33] 19 U.S.C. 2251.
[34] 19 U.S.C. 2240, 2436.
[35] 7 U.S.C. 624.

Private Sector Advisory Committees

The first formal mechanism providing for ongoing advice from the private sector on international trade matters was authorized by the Trade Act of 1974.[36] In view of the positive contribution of the advisory committees to the negotiations of the Tokyo Round of Multilateral Trade Negotiations and to passage of the implementing legislation—the Trade Agreements Act of 1979—Congress provided for continuation of the advisory committee structure in the 1979 Act.[37] Congress also expanded the committee's responsibilities by authorizing them to provide advice on the priorities and direction of U.S. trade policy, in addition to their previous responsibilities.

The U.S. Trade Representative manages the advisory committees in cooperation with the Departments of Agriculture, Commerce, Labor, and other departments. The committee structure is three-tiered, with the most senior level represented by the Advisory Committee for Trade Negotiations (ACTN). The ACTN is a 45-member body composed of Presidentially-appointed representatives of government, labor, industry, agriculture, small business, service industries, retailers, consumer interests, and the general public. The group provides overall guidance on trade policy matters, including trade agreements and negotiations, and is chaired by a chairman elected by the committee. The group convenes at the call of the U.S. Trade Representative.

The second tier is made up of policy advisory committees representing specific sectors of the economy, whose role is to advise the government of the impact of various trade measures on their respective sectors.

The third tier is composed of sector advisory committees consisting of experts from various fields. Their role is to provide specific, technical information and advice on trade issues involving their particular sector. Members of the second and third tier are appointed by the U.S. Trade Representative and the Secretary of the relevant department or agency.

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[36] 19 U.S.C. 2155.
[37] 19 U.S.C. 2155.

STATUTORY CITATIONS OF MAJOR U.S. TRADE LAWS

Agricultural Act of 1956

Public Law 84-540, ch. 327, approved May 28, 1956, 70 Stat. 188, codified as amended at various sections of titles 7 and 16.

Conference Report on H.R. 10875, Report No. 2197; H.R. 10875 reported from House Agriculture Committee, April 30, 1956, House Report 84-2077; H.R. 10875 reported from Senate Committee on Agriculture and Forestry, May 11, 1956, Senate Report 84-1966.

Agricultural Adjustment Act of 1933

Act of May 12, 1933, ch. 25, 48 Stat. 31, 7 U.S.C. 601 *et seq.*

H.R. 3835 reported from House Agriculture Committee, March 20, 1933, House Report 73-6; H.R. 3835 reported from Senate Committee on Agriculture and Forestry, April 5, 1933, Senate Report 73-16, and Senate Committee on Banking and Currency, April 21, 1933, Senate Report 73-40.

Caribbean Basin Economic Recovery Act

Public Law 98-67, title II, approved August 5, 1983, 97 Stat. 384, 19 U.S.C. 2701 *et seq.*

Title II of Conference Report on H.R. 2973, House Report 98-325; H.R. 2769 reported from House Committee on Ways and Means, June 24, 1983, House Report 98-226; H.R. 2769 reported from Senate Committee on Finance, October 29, 1983, Senate Report No. 98-285.

Export Administration Act of 1979 (now expired)

Public Law 96-72, approved September 29, 1979, 93 Stat. 503, 50 App. U.S.C. 2401-2420.

Conference Report on S. 737, House Report 96-482; S. 737 passed House in lieu of H.R. 4034, September 25, 1979 (*see* House Report 96-200 on H.R. 4034); S. 737 reported from Senate Banking, Housing, and Urban Affairs Committee, May 15, 1979, Senate Report 96-169.

Export Trading Company Act of 1982

Public Law 97-290, approved October 8, 1982, 96 Stat. 1233, 15 U.S.C. 4001-4003, 12 U.S.C. 1841-1843, 15 U.S.C. 4011-4021.

Conference Report on S. 734, House Report 97-924; S. 734 passed House in lieu of H.R. 1799 and H.R. 6016, July 27, 1982 (*see* House Report 97-637 on H.R. 1799 and House Report 97-629 on H.R. 6016); S. 734 reported from Senate Banking, Housing, and Urban Affairs Committee, March 18, 1981, Senate Report 97-27.

Foreign Corrupt Practices Act of 1977

Public Law 95-213, title I, approved December 19, 1977, 91 Stat. 1494, 15 U.S.C. 78a-78ff.

Conference Report on S. 305, House Report 95-831; S. 305 passed House November 1, 1977 (no committee report); S. 305 reported from Senate Banking, Housing, and Urban Affairs Committee, May 2, 1977, Senate Report 95-114.

Generalized System of Preferences Renewal Act of 1984

Public Law 98-573, title V approved October 30, 1984.

Title V of Conference Report on H.R. 3398, House Report 98-1156; H.R. 6023 reported from House Committee on Ways and Means, September 27, 1984, House Report 98-1090; S. 1718 reported from Senate Committee on Finance, May 24, 1984, Senate Report 98-485.

International Coffee Agreement Act of 1983

Public Law 98-120, approved October 12, 1983, 97 Stat. 809, *amending* Public Law 96-599, approved December 24, 1980, 94 Stat. 3491, 19 U.S.C. 1356k-1356n.

H.R. 3813 reported from House Committee on Ways and Means, September 22, 1983, House Report 98-376; S. 1847 reported from Senate Committee on Finance, September 28, 1983, Senate Report 98-250.

International Emergency Economic Powers Act

Public Law 95-223, title II, approved December 28, 1977, 91 Stat. 1626, 50 U.S.C. 1701-1706.

H.R. 7738 reported from House International Relations Committee, June 23, 1977, House Report 95-459; H.R. 7738 reported from Senate Banking, Housing, and Urban Affairs Committee, October 3, 1977, Senate Report 95-466.

International Sugar Agreement Act

Public Law 96-236, section 2, approved April 22, 1980, 94 Stat. 336, *as amended by* Public Law 97-446, section 153, approved January 12, 1983, 96 Stat. 2329, 7 U.S.C. 3602.

H.R. 6029 reported from House Committee on Ways and Means, December 20, 1979, House Report 96-725, pt. I. H.R. 6029 reported from Senate Committee on Finance, March 26, 1980, Senate Report 96-644.

International Trade and Investment Act

Public Law 98-573, title III, approved October 30, 1984.

Title III of Conference Report on H.R. 3398, House Report 98-1156; H.R. 2848 reported from House Energy and Commerce Committee, May 16, 1983, House Report 98-203, pt. I, and House Committee on Ways and Means, September 22, 1983, House Report 98-203, pt. II. H.R. 3398 reported from Senate Committee on Finance, November 10, 1983, Senate Report 98-308; S. 144 reported from Senate Committee on Finance, March 14, 1983, Senate Report 98-24.

Meat Import Act of 1979

Public Law 96–177, section 1, approved December 31, 1979, 93 Stat. 1291, 19 U.S.C. 1202.

H.R. 2727 reported from House Committee on Ways and Means, June 6, 1979, House Report 96–238; H.R. 2727 reported from Senate Committee on Finance, December 7, 1979, Senate Report 96–465.

Reciprocal Trade Agreements Act of 1934

Public Law 73–316, ch. 474, approved June 12, 1934, 48 Stat. 943, 19 U.S.C. 1001, 1201, 1351–1354.

H.R. 8687 reported from House Committee on Ways and Means, March 17, 1934, House Report 73–100; H.R. 8687 reported from Senate Committee on Finance, May 2, 1934, Senate Report 73–871.

Steel Import Stabilization Act

Public Law 98–573, title VIII, approved October 30, 1984.

Title VIII of Conference Report on H.R. 3398, House Report 98–1156; H.R. 6301 reported from House Committee on Ways and Means, September 27, 1984, House Report 98–1089; No comparable Senate bill.

Tariff Act of 1930

Public Law 71–361, approved June 17, 1930, ch. 497, 46 Stat. 590, as amended, codified as amended at various sections of titles 6, 19, and 22.

Conference Reports on H.R. 2667, House Reports 71–1326, Senate Doc. Nos. 161 and 162; H.R. 2667 reported from House Committee on Ways and Means, May 9, 1929, House Report 71–7; H.R. 2667 reported from Senate Committee on Finance, September 4, 1929, Senate Report 71–37.

Trade Act of 1974

Public Law 93–618, approved January 3, 1975, 88 Stat. 1978 codified as amended at various sections of titles 5, 19, 26 and 31.

Conference Report on H.R. 10710, House Report 93–1644; H.R. 10710 reported from House Committee on Ways and Means, October 10, 1973, House Report 93–571; H.R. 10710 reported from Senate Committee on Finance, November 26, 1974, Senate Report 93–1298.

Trade Agreements Act of 1979

Public Law 96–39, approved July 26, 1979, 93 Stat. 144; codified as amended at various sections of titles 5, 13, 19 and 28.

H.R. 4537 reported from House Committee on Ways and Means, July 3, 1979, House Report 96–317; H.R. 4537 reported from Senate Committee on Finance, July 17, 1979, Senate Report 96–249.

Trade and Tariff Act of 1984

Public Law 98-573, approved October 30, 1984.

Conference Report on H.R. 3398, House Report 98-1156; H.R. 3398 reported from House Committee on Ways and Means, June 24, 1983, House Report 98-267; H.R. 3398 reported from Senate Committee on Finance, November 10, 1983, Senate Report 98-308.

Trade Expansion Act of 1962

Public Law 87-794, approved October 11, 1962, 76 Stat. 872, codified as amended at various sections of title 19.

Conference Report on H.R. 11970, Report 2518; H.R. 11970 reported from House Committee on Ways and Means, June 12, 1962; House Report 87-1818; H.R. 11970 reported from Senate Committee on Finance, September 14, 1962, Senate Report 87-2059.

Trading with the Enemy Act

Public Law 65-91, approved October 6, 1917, ch. 106, sections 1-31, 40 Stat. 411, 50 App. U.S.C. 1-44

Conference Report on H.R. 4960, House Report 65-155; H.R. 4960 reported from House Committee on Interstate and Foreign Commerce, House Report 65-85; H.R. 4960 reported from Senate Committee on Commerce, Senate Reports 65-111 and 65-113.

Wine Equity and Export Expansion Act of 1984

Public Law 98-573, title IX, approved October 30, 1984.

Title IX of Conference Report on H.R. 3398, House Report 98-1156; H.R. 3795 reported by House Committee on Ways and Means, September 27, 1984, House Report 98-1091.

DESCRIPTIONS OF MAJOR MULTILATERAL TRADE ORGANIZATIONS

General Agreement on Tariffs and Trade (GATT)

The GATT is a multilateral instrument, currently subscribed to by 90 countries, which has served as the framework for international trade since its inception in 1948. The GATT has evolved into a comprehensive set of rules governing many aspects of international trade. The organization provides a framework within which international trade negotiations are conducted and trade disputes among the world's major trading partners are resolved. It is estimated that over four-fifths of world trade is covered by GATT rules. The GATT headquarters are in Geneva.

GATT Membership as of November 1, 1984—Contracting Parties

Argentina
Australia
Austria
Bangladesh
Barbados
Belgium
Belize
Benin
Brazil
Burkina Faso
Burma
Burundi
Cameroon
Canada
Central African Republic
Chad
Chile
Colombia
Congo
Cuba
Cyprus
Czechoslovakia
Denmark
Dominican Republic
Egypt
Finland
France
Gabon
Gambia
Germany, Fed. Rep. of
Ghana
Greece
Guyana
Haiti
Hungary
Iceland
India
Indonesia
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan
Kenya
Korea, Rep. of
Kuwait
Luxembourg
Madagascar
Malawi
Malaysia
Maldives
Malta
Mauritania
Mauritius
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Pakistan
Peru
Philippines
Poland
Portugal
Romania
Rwanda
Senegal
Sierra Leone
Singapore
South Africa
Spain
Sri Lanka
Suriname
Sweden
Switzerland
Tanzania
Thailand
Togo
Trinidad and Tobago
Turkey
Uganda
United Kingdom
United States
Uruguay
Yugoslavia
Zaire
Zambia
Zimbabwe

Organization for Economic Cooperation and Development (OECD)

Founded in 1961 and based in Paris, the OECD is the primary organization for industrialized nations to discuss trade and economic matters. The objectives are to achieve economic growth and employment and a rising standard of living in member countries while maintaining financial stability. The 24 member countries use the OECD and its various committees and working groups to conduct both studies and negotiations on particular economic problems and to coordinate their policies for purposes of international negotiations.

OECD Membership

Australia
Austria
Belgium
Canada
Denmark
Finland
France
Germany, Federal
  Republic of
Greece
Iceland
Ireland
Italy
Japan
Luxembourg
Netherlands
New Zealand
Norway
Portugal
Spain
Sweden
Switzerland
Turkey
United Kingdom
United States

United Nations Conference on Trade and Development (UNCTAD)

Based in Geneva and associated with the United Nations system, UNCTAD focuses attention on international economic relations and measures that might be taken by developed countries to accelerate the pace of economic and industrial development in the developing countries. The conference has met quadrennially since 1964 in various locations throughout the world. UNCTAD committees meet several times each year between the major conferences and is supported by the permanent UNCTAD Secretariat in Geneva.

Customs Cooperation Council (CCC)

Established in 1952, the Customs Cooperation Council is a 93-member international organization with headquarters in Brussels. It deals exclusively with customs matters. Its objective is to obtain, in the interest of international trade, the best possible degree of uniformity among the customs systems of member nations. The United States became a member on November 5, 1970.

The Customs Service is the lead government agency in dealing with the various activities of the Council, including the work of the Harmonized System Committee. The Customs Service heads the U.S. delegations to the sessions of the Committee. Generally, the Council studies questions relating to cooperation in customs matters, examines technical aspects of customs systems and furnishes information and advice to member states.

SUMMARY OF POSSIBLE ACTIONS UNDER U.S. TRADE REMEDY LAWS

Statutory Provision	Basis for Cause of Action	Administering Authority	Form of Remedy
Antidumping law (19 U.S.C. 1673)	Import sales at less than fair value resulting in material injury (both product- and country-specific).	Commerce (dumping determination); ITC (injury determination).	Antidumping duties equal to margin of dumping.
Countervailing Duty Law (19 U.S.C. 1303, 1671)	Import sales benefiting from foreign subsidies (both product- and country-specific).	Commerce (subsidy determination); ITC (injury determination).	Countervailing duties equal to the amount of net subsidies.
Section 301 (19 U.S.C. 2411)	Violation of U.S. rights under a trade agreement, or any foreign act, policy or practice which is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce.	USTR (recommendation); President (final action).	"All appropriate and feasible action" including retaliation in the form of suspension or withdrawal of trade agreement benefits, imposition of tariffs, fees or other import restrictions.
Section 337 (19 U.S.C. 1337)	Unfair methods of competition injuring a U.S. industry or restraining or monopolizing U.S. trade and commerce—usually a patent infringement (product-specific).	ITC (order); President (veto authority).	Exclusion from entry into U.S., or a cease-and-desist order.

SUMMARY OF POSSIBLE ACTIONS UNDER U.S. TRADE REMEDY LAWS—Continued

Statutory Provision	Basis for Cause of Action	Administering Authority	Form of Remedy
Section 201 (19 U.S.C. 2251)	Increased imports which are a substantial cause of serious injury (product-specific from all sources).	ITC (recommendation); President (final action); Congress (disapproval of Presidential action if different than ITC recommendation).	Tariff increases, tariff-rate quotas, quantitative import restrictions, orderly marketing agreements, expedited adjustment assistance.
Section 406 (19 U.S.C. 2436)	Increased imports from a Communist country which are a significant cause of material injury (both product-specific and country-specific).	ITC (recommendation); President (final action); Congress (disapproval of Presidential action if different than ITC recommendation).	Tariff increases, tariff-rate quotas, quantitative import restrictions, orderly marketing agreements, expedited adjustment assistance.
Section 232 (19 U.S.C. 1862)	Imports which threaten the national security (product-specific from all sources).	Commerce (recommendation); President (final action).	Such action as the President deems necessary to safeguard the national security.

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